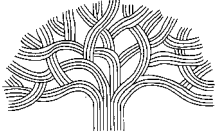


# **CONFIDENTIAL DOCUMENT**



## **CITY OF OAKLAND COMMUNITY POLICE REVIEW AGENCY**

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### **REPORT OF INVESTIGATION: OIS OF JOSHUA PAWLIK APRIL 22, 2019**

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Complainant's Name: **(5)(B)**, mother of Mr. Joshua Ryan Pawlik, decedent

CPRA Case Number: **18-0249**

Subject Officers: **Officer William Berger #9264  
Officer Brandon Hraiz #9285  
Officer Josef Phillips #9446  
Officer Craig Tanaka #9484  
Sgt. Francisco Negrete #8956  
Lt. Alan Yu #8605**

Date of Incident: **March 11, 2018**

Statute of Limitations (3304): **TOLLED**

CPRA Investigator: **Joan Saupé**

## **I. INTRODUCTION**

This is the Report of Investigation of a two-part report in the OIS (Officer-Involved Shooting) case of Mr. Joshua Pawlik, in which the facts of each of eight allegations against the subject officers are analyzed to reach a finding for each officer, and training and policy recommendations for OPD are made.

The report is divided into two-parts to stream-line the voluminous information in the case for ease of reference and reading. The other part of this two-part report is a separate document entitled Investigation for Case 18-0249, which contains a summary of the facts, rules, evidence, law, materials and information reviewed in the case, which were reviewed and/or relied upon in making an analysis of the facts and law, and in reaching the findings as to the eight allegations contained in this Report of Investigation.

Section VII of this Report of Investigation, is an analysis of the use of lethal force in general which is applicable to the first four allegations. Section VIII contains the eight allegations against the subject officers individually, the analysis as to each, and the

findings. Section IX contains training and policy recommendations, and an officer commendation.

## **II. CPRA AUTHORITY TO INVESTIGATE**

Measure LL, an Amendment to the Charter of the City of Oakland states in part that the Agency (Community Police Review Agency) shall receive, review and prioritize all public complaints concerning the alleged misconduct or failure to act of all (Police) Department sworn employees (Section F, Investigations). The Measure further states in part, that the Agency shall investigate public complaints that include uses of force. The Agency shall also investigate any other possible misconduct or failure to act of a Department sworn employee, whether or not the subject of a public complaint, as directed by the Commission. The Commission also gave to the Director the discretion to select for investigation any other possible misconduct or failure to act of a Department sworn employee, whether or not the subject of a public complaint.

## **III. SCOPE OF THE INVESTIGATION**

The investigation of this case was generated internally by then-CPRA Director Anthony Finnell. The initial scope of the investigation was into the OIS shooting; namely whether the lethal force in the death of Mr. Joshua Pawlik by Oakland police officers was proper. The investigator also looked into whether the non-lethal force (a beanbag round) used against Mr. Pawlik was proper.

On October 5, 2018, the CPRA received a complaint from (5)(B) Mr. Joshua Pawlik's mother, on his behalf. The complaint was sent by the Law Offices of John L. Burris, Oakland. Her complaint named Officers Berger, Hraiz, Tanaka and Sgt. Negrete as the subject officers, as well as "Holgrem (sic), Roland A." Capt. Holmgren was a part of the CID investigation, and did not participate in the use of force against Mr. Pawlik. He was not on scene at the time the force took place. The complaint did not list any improper action by Capt. Holmgren. Therefore, no CPRA investigation was conducted as to Capt. Holmgren.

Oakland Police Department's Internal Affairs Division (IAD) also named two supervisors as subject officers in its investigation, to determine if they performed their supervisory duties in accordance with Departmental Policies and Procedures. The CPRA Investigator similarly added and reviewed these same allegations.

Finally, IAD added an additional allegation against an officer for failing to advise Communications of his rifle deployment. CPRA additionally added and reviewed this issue.

#### **IV. POSSIBLE FINDINGS AND STANDARD OF PROOF USED FOR REACHING A FINDING**

The possible findings as to each allegation are as follows:

Unfounded: The investigation clearly established that the allegation is not true.

Exonerated: The investigation clearly established that the actions of the police officer that formed the basis of the complaint are not violations of law or departmental policy.

Not-sustained: The investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation made in the complaint.

Sustained: The allegation disclosed sufficient evidence to clearly prove the allegation made in the complaint.

The CPRA standard of proof is a preponderance of the evidence. A “preponderance of the evidence” means that the superior weight of evidence upon the allegations involved, while not enough to be completely free from reasonable doubt, is sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other; it is more likely to be true than not.

#### **V. INVESTIGATIVE STEPS**

When this case was assigned to this CPRA Investigator in July 2018, the only materials available were PDRDs and scene photos. It was not until January, 2019 when Internal Affairs informed the CPRA that OPD’s CID (Criminal Investigations Division) homicide investigation was completed, that the CPRA could start to obtain the rest of OPD’s materials to begin the full investigation at the end of January, 2019.

The Investigator’s steps included independently researching and reviewing materials: the law pertaining to issues in this case; reviewing OPD’s applicable rules and training materials; reviewing and summarizing all interviews in the case; reviewing and summarizing all Crime Reports; reviewing all agency reports; reviewing and researching internet information; reviewing and summarizing all the PDRD videos of all the officers on scene. One interview was conducted. Further interviews were not conducted due to concerns as to the reliability of the information given the time that has passed. The materials reviewed are set forth in the second part of this Report of Investigation, in a document entitled “Investigation for Case 18-0249.” From relevant parts of these materials, the pertinent facts were obtained to formulate the analysis of the allegations in this case. The Report of Investigation was submitted to the CPRA Director on April 22, 2019 for review and approval.

## VI. BACKGROUND

On March 11, 2018, a 911 call was made about 1817 hours (6:17 p.m.) by Oakland resident [REDACTED] (5)(B) who was out walking his dog regarding a man (later identified as Mr. Joshua Pawlik) passed out between two houses located between 922 and 928 40<sup>th</sup> Street, which is a residential neighborhood. The man was described as having a gun in his hand. The weather was clear and dry, and it was still daylight outside.

Oakland Police Officer Josef Phillips was the first officer to arrive on scene. He observed a man lying in the side yard as described. Officer Phillips stepped onto the porch of 928 40<sup>th</sup> Street to get a closer look at the man. Officer Phillips radioed in that the man was a male Hispanic, 20's, black hoodie, white shirt and blue jeans. Officer Phillips reported that the man looked like he was under the influence of 922 (drunk on the street). He reported the man had a small, semi-automatic in his right hand. Officer Josef Phillips waited for back-up, and did not engage the man.

The next officer on scene was OPD Sgt. Herbert Webber, who arrived on scene in his OPD vehicle with lights and sirens. He blocked the west-bound entrance to 40<sup>th</sup> Street, which is a divided street. Sgt. Webber went up to Officer Phillips, who was behind his OPD-marked SUV. Sgt. Webber reported that he had less-lethal (less-lethal shotgun). Officer Phillips' SUV was parked in front of the walkway area of the two homes in the street. Sgt. Webber stated that the subject appeared "not to be aware of our presence."

At approximately 1829 hours, (6:29 p.m.), OPD Sgt. Francisco Negrete (an OPD SWAT member), along with Patrol Rifle Officers (PRO) Officer Brandon Hraiz and Officer William Berger arrived in response to a radio call of a man with a gun. All three had AR-15 rifles. Officers Hraiz and Berger were assigned as lethal cover by Sgt. Negrete. Officer Phillips was assigned as less-lethal beanbag, and was given Sgt. Webber's less-lethal shotgun (holding beanbag rounds). Officer Berger was initially positioned to the right behind a small pick-up parked at the curb. Officer Hraiz and Officer Phillips were originally behind Officer Phillips' SUV. The BearCat, OPD's armored vehicle, was requested by Sgt. Negrete to come quickly to the scene. Officer Craig Tanaka, another PRO, drove the BearCat to the scene and also brought his AR-15 rifle. The decision by Sgt. Negrete was made not to attempt to wake the man until the BearCat arrived to provide better cover for the officers. Later, OPD Officer Julie Yu arrived and acted as lethal cover for Officer Berger. Officers were set up around the perimeter, and potentially directly-affected homes nearby were ordered to be evacuated.

While waiting for the BearCat, Sgt. Negrete discussed his plans with Officers Berger, Hraiz and Sgt. Webber for taking the man into custody. He stated once the BearCat gets here we're going to do some announcements, Code 3, siren, announcement, Code 3, siren; If there's no response, we're going to thump him with the beanbag. If there's a response, we're going to challenge him. We're going to bring him back to the BearCat, handcuff him, obviously unarmed. Once we thump him, then we're probably going to go to a Taser. We'll have someone stand up there with a Taser, and come

down and Tase him. If that doesn't work, then we'll finally come up with a shield or two.

Lt. Alan Yu arrived on scene, and took the role of the Incident Commander, but stayed on the south side of the divided street. Lt. Yu made Sgt. Negrete supervisor of the DAT. Sgt. Negrete discussed his plans with him.

No Crisis Intervention trained officer (CIT) was incorporated into any contingency planning. The Tactical Operations Team was not called for assistance. No Spanish-speaking officer was called to the scene, though Officer Phillips thought the subject could be Hispanic.

In the interim, officers noted Mr. Pawlik breathing and swallowing. Sgt. Mark Rowley arrived on scene, and obtained Officer Berger's binoculars. Sgt. Rowley noted that "the gun is pointed kind of in our direction."

The BearCat arrived at 1903 hours (7:03 p.m.). The SUV was moved, and Officer Tanaka placed the BearCat in a canted position where the SUV had been, as directed by Sgt. Negrete. Officer Tanaka shut off the engine, and got out of the BearCat. Officer Tanaka, not assigned a role by Sgt. Negrete, took a spot on the passenger side of the BearCat railing with his rifle as lethal cover. Officer Berger moved over to the passenger side of the BearCat. Officer Hraiz positioned himself in the turret. Sgt. Negrete's position was on the front passenger side of the BearCat. Officer Phillips was also on the passenger side of the BearCat. Sgt. Webber moved into the BearCat PA system as announcer.

Within seconds of the BearCat's arrival, someone yelled out, "hey movement." What occurred next can be seen because Sgt. Webber had placed his PDRD on top of the BearCat. The other officers' PDRDs do not show Mr. Pawlik's movements.

Commands were given to Mr. Pawlik. Those commands, along with Mr. Pawlik's actions, as seen and heard on Sgt. Webber's PDRD, with the timeframe denoted so that the amount of time can be understood, are as follows:

24:16 Someone yells, police don't move. Put your hands up.

24:18 Someone yells, hands up. Mr. Pawlik can be seen lifting his head. His head is on the left side. His face is facing towards the officers.

24:22 Someone says, get your hand off the gun. Mr. Pawlik's head is still raised.

24:24 Mr. Pawlik's head is raised even higher.

24:25 Someone yells, hey, do not move.

24:29 Someone yells, get your hand off that gun young man. Mr. Pawlik's head bobbles a bit.

24:32 Mr. Pawlik's head goes up higher. Someone says, get your hand off the gun.

24:36 Mr. Pawlik's head lowers a little bit more. Someone yells, get your hand off the gun.

24:39 Officer Julie Yu on the PA (Public Address system—a loudspeaker) says, get your hand off the gun.

24:42 Officer Berger yells in flawed Spanish, "suerta la pistol" (let go of the gun; suelte la pistol is the correct term; Officer Berger says it wrong in Spanish, but perhaps close enough to understand if the subject was a Spanish-speaker).

24:49 Officer Berger says to Officer Phillips, if that gun moves—bag him. Someone else says yep.

24:56 Someone yells, get your hand off the gun. Mr. Pawlik's head is still raised.

25:00 Mr. Pawlik appears to be trying harder to sit up now. He may have been trying to push off on elbow (Cannot see detail of the gun). Someone says, get your hand off the--. Firing immediately commences.

25:01 Mr. Pawlik falls backwards and is down. It appears his right arm flings back as he is falling.

25:03 Firing stops.

Officers thereafter got a shield, and approached Mr. Pawlik. First aid was commenced immediately, and medical (an ambulance) which had been positioned nearby arrived. Mr. Pawlik was pronounced dead at the scene.

The officers at the scene who fired weapons were determined to be Officers Berger, Hraiz, Tanaka, and Sgt. Negrete. Officer Berger fired six rounds, Officer Hraiz fired five rounds, Officer Tanaka fired four rounds, Sgt. Negrete fired seven rounds, and Officer Phillips fired one beanbag round.

## **VII. GENERAL ANALYSIS OF THE USE OF LETHAL FORCE**

### **A. Whether Officers Had the Right to Detain Mr. Pawlik and the Method of Detention**

The circumstances leading up to this deadly use of force began when the Oakland Police Department (OPD) was notified through a 911 Fire Dept. Communications call from a passerby, that there was an unknown man (later identified as Mr. Joshua Pawlik) asleep or unconscious on a lawn/walkway area between two homes in a heavily residential neighborhood and facing towards 40<sup>th</sup> Street which has two lanes of traffic in each direction, with what looked like a gun in his right hand during the day time. OPD Officer Josef Phillips responded to the scene, and confirmed the facts as called in. He

radioed in that the unknown subject, "has a small, semi-automatic in his right hand." As such, Mr. Pawlik presented a possible danger to the public and the police. There was reasonable suspicion for the police that he was in violation of several possible laws: California Penal Code section 26350 which makes it a crime to openly carry an exposed unloaded handgun in a public place; section 25860 which makes it a crime to carry a loaded firearm in a public place; possibly California Penal Code sections 647(e), for lodging in place, whether public or private, without the permission of the owner or person entitled to the possession or control of it; or California Penal Code 647(f), for a person who is found in any public place under the influence of intoxicating liquor, or any drug, etc. Therefore, the police had the right to detain Mr. Pawlik.

However, detaining Mr. Pawlik involved danger to the police and the public since Mr. Pawlik had a gun in his hand and could wake and potentially start firing it at any moment. Officers have the legal right to take necessary actions for officer and public safety.

Per OPD training, the first officer on the scene when encountering a person with a gun (a high-risk incident response/high-risk arrest/crimes in which innocent bystanders are in danger) is to call for back-up and assess the scene. They are not to take steps to force an incident to a conclusion. OPD Officer Josef Phillips did that; He radioed a physical description of the subject; reported it looked like the subject was under the influence of 922 (drunk on the street); and that he had a small, semi-automatic in his right hand. The second officer on scene was OPD Sergeant Herbert Webber. Sgt. Webber used his vehicle to block some traffic, and took cover with Officer Phillips while observing the subject, while other officers arrived on scene and a plan for the detention and arrest of the subject by the DAT (Detention and Arrest Team) was formulated by OPD Sgt. Francisco Negrete, who was assigned as the supervisor by OPD Incident Commander Lt. Alan Yu, and who also approved the plan.

Pursuant to the plan, OPD police officers closed off 40<sup>th</sup> Street to traffic and pedestrians, set up a perimeter, evacuated nearby homes as needed and possible, assigned lethal (AR-15 rifles) and non-lethal cover (Taser/beanbag rounds), and established cover for the officers observing the subject—initially behind Officer Phillips' patrol vehicle and a pick-up truck parked at the curb, and later behind OPD's BearCat, an armored vehicle which among other things, allowed the officers better protection from any bullets should the subject awake and fire his weapon. Cover behind an armored vehicle provides superior coverage as unlike a regular vehicle, bullets from a handgun cannot penetrate it. However, officers' heads and some of some officers' extremities were still exposed while observing Mr. Pawlik.

The plan was to take Mr. Pawlik into custody peacefully. Basically, the initial plan was to wake Mr. Pawlik after the BearCat arrived on scene. The plan was first to wake Mr. Pawlik verbally. If Mr. Pawlik did not wake up with the verbal announcements, the plan was to wake him with loud noises (not specified), and then to use physical means (a beanbag round to the legs). Finally, if that did not work to wake him, the plan was for officers to approach him behind shields and physically remove the gun. Once the subject was awake, he was going to be "challenged" per Sgt. Negrete. What exactly Sgt. Negrete meant by "challenged" isn't clear as heard on his PDRD (Portable Digital

Recording Device), but Sgt. Negrete did say if the subject was not compliant, "he's going to get thumped right away" to whom is believed was Officer Phillips (Negrete PDRD/3:27), which means Mr. Pawlik would get hit with a beanbag. The plan to take Mr. Pawlik into custody was not carried out as Mr. Pawlik woke up on his own, moments after the BearCat was positioned into place, and he began to move. Once Mr. Pawlik started moving, commands were given by multiple police officers.

## **B. Whether Officers Used Proper Verbal Commands Before Resorting to the Use of Physical Force**

OPD officers pursuant to DGO K-3, are taught verbal commands are the minimum means of halting an offense, gaining compliance or overcoming resistance. Officers are taught that verbal commands shall be courteous, and clearly relay the police objective. To the extent possible and without ever compromising safety, members are required to use verbal commands to accomplish the police objective before resorting to physical force.

The officers gave contradictory orders initially when Mr. Pawlik woke up. An officer did immediately yell, "Police, don't move!" However, the next orders by officers that followed were contradictory and given by multiple officers. The next order was, "Don't move, put your hands up." Putting hands up and not moving are contradictory to each other. Mr. Pawlik, if he had put his hands up at that time, could have resulted in Mr. Pawlik raising the gun in his right hand also which is inconsistent with the order, don't move. Raising of his hands could have resulted in officers thinking he was a threat, and firing at him. This contradictory order was repeated. However, Mr. Pawlik did not raise his hands or hand at that time. For the next 27 seconds preceding the use of force only one order was given, and that was "hands off the gun" five times (six with Spanish, which we don't know if Mr. Pawlik understood or not).

## **C. The Rules and Law Regarding the Right of an Officer to Use Force and Lethal Force**

Mr. Pawlik did not respond verbally to the officers' commands, nor are there any facts or video evidence that Mr. Pawlik ever took his hand off the gun he had. Rather, while the commands were being given, Mr. Pawlik looked in the direction of the officers, and his head bobbed several times. Mr. Pawlik started to sit up. He went back down. This happened three times. On the fourth time, Mr. Pawlik tried to sit up further. It appears that Mr. Pawlik may have been pushing off with his right arm to help get up. Per the officers' post-shooting statements, when Mr. Pawlik sat up, he raised the pistol at them. It was at this point Officers Tanaka, Hraiz, Berger and Sgt. Negrete used lethal force by firing their rifles, and Officer Phillips fired a less-lethal bean bag shot, all within 2.3 second's time.

The rule for OPD officers regarding use of force, and the standard that the officers are trained on, is found in OPD's Departmental General Order (DGO) K-3, "Use of Force"



policy. DGO K-3, states that, "Reasonable force is that amount of force that is objectively reasonable to affect a lawful police purpose and protect the safety of members or others based upon the totality of the circumstances."

Force must also be analyzed under the Fourth Amendment's objective reasonableness test. The application of this test requires an analysis of the totality of the circumstances, including these factors to determine if the seizure is reasonable: the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of law enforcement officers or others; and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The determination of reasonableness is not based on the 20/20 vision of hindsight.

Under DGO K-3, Section II." Force Considerations," sub-section B., "Immediate Threat", an immediate threat is considered to exist if a suspect has demonstrated actions that would lead one to reasonably believe that the suspect will continue to pose a threat of death or serious bodily injury if not apprehended without delay.

A person is an immediate threat if the person is reasonably perceived by a member or employee to have the present intent, means, opportunity and ability to complete the threat, regardless of whether the threatened action has been initiated.

Per DGO K-3, Section II, "Force Considerations," Subsection E., "Lethal Force," lethal force is defined as any force that creates a substantial risk of causing death or serious bodily injury. A member may use lethal force to protect themselves or others when the member objectively and reasonably believes that his/her life, or the life of another, is in immediate danger of serious bodily injury, based upon the totality of the facts known to the member at the time.

Lethal force includes, but is not limited to, the discharge of a firearm with lethal ammunition. Lethal ammunition is ammunition that, by design and application, is intended to cause serious bodily injury or death.

## **D. Review of Evidence In Regards to the Use of Lethal Force**

Therefore, in determining whether the officers were in compliance in using lethal force on Mr. Pawlik pursuant to K-3 and the Fourth Amendment, we must look at whether the facts were there that warranted lethal force. It must be determined: Did Mr. Pawlik have a gun in his hand at the time he was shot, and if Mr. Pawlik had a gun in his hand, was it a reasonably perceived immediate threat to the officers and/or the public at the time the officers used lethal force on him?

### **1. Did Mr. Pawlik have a gun in his hand at the time officers fired on him?**

Mr. Pawlik was observed with a gun in his hand at all times up to the time of the fatal use of force, as heard in statements made and conversations heard on OPD officers' PDRDs. There were never any statements made or discussion heard, or any facts to support that the gun was anywhere other than in Mr. Pawlik's right hand at all times.

The gun was first seen by an independent citizen who called 911 and said, "I 'seen' something in the man's hand...it could be a pistol."

Officer Phillips, the first officer on scene, described that Mr. Pawlik had a smaller-sized, semi-automatic in his right hand (Phillips PDRD/:54).

Officer Berger said while looking at Mr. Pawlik, oh yeah, gun just moved, the gun just moved (Berger PDRD/20:25).

Officer Hraiz acknowledged the presence of the gun by saying "yeah," when someone else says it's in his right hand (Hraiz PDRD :17).

Sgt. Negrete is shown a photo Sgt. Rowley took with his phone of Mr. Pawlik with the gun (Sgt. Negrete PDRD/10:45).

Sgt. Rowley looked at the gun through binoculars. He is heard saying when discussing the gun, "that's his hand on top of the kind of trigger/handle area." Sgt. Rowley said the gun is pointed kind of in our direction (Rowley PDRD/3:25).

Officer Julie Yu, who also looked at the gun with binoculars, said the barrel (of the gun) looks "insanely protruding" (Rowley PDRD/8:33). Officer Julie Yu tells Officer Berger, so he's got the base of it (the gun). His thumb's up. He hasn't twitched that hand at all... uh—his thumb is moving. Uh, his thumb is moving. You see his right thumb. It just moved up. It was on the butt of the gun at first—like this flat—and he just picked it up...Do you see how he has it canted like a square. It was down earlier. (Yu PDRD/one of two, 13:47). Officer Yu also commented at one point, "I can barely hold my phone when I fall asleep with it in my hand. He's not letting go" (Yu PDRD/one of two, 26:35).

Officers were yelling after Mr. Pawlik woke up, to put the gun down, indicating their perception he was holding a gun in his hand.

All of the subject officers who used lethal/non-lethal force stated in interviews with the Oakland Police Department CID (Criminal Investigations Division) and Internal Affairs that Mr. Pawlik raised his gun at them prior to the time they fired.

## **2. If Mr. Pawlik had a gun in his hand, was he reasonably perceived to be an immediate threat to the officers at the time they used lethal force on him?**

### **a) Video evidence as to whether there was an immediate threat**

There is only one PDRD/video recording of the shooting. Sgt. Herbert Webber had placed his PDRD on top of the BearCat (and earlier on Officer Phillips' patrol vehicle) facing towards Mr. Pawlik prior to the shooting. The other involved officers had on their PDRDs, but due to their locations behind cover at the time, their PDRDs did not capture the shooting. The Sgt. Webber PDRD video shows important information for

this analysis, but it is not true-to-life size as the officers would have seen the events, it is grainy when enlarged, and per expert analysis, it is not possible to see the movement of the gun.

OPD's Sgt. Ramirez, at the request of CID, Homicide Division, did an analysis of Sgt. Webber's PDRD, and concluded with "a high level of confidence," the following: that the subject was lying on his back in a supine position with his right-hand palm up, with a gun in his hand. As the armored vehicle was put in place, the subject started to move. The subject lifted his head and torso towards the street where the officers were located. It appeared that as the subject was moving to a sitting position, the OIS (Officer Involved Shooting) occurred. Sgt. Ramirez stated there is not enough information to clearly see the gun and/or its exact movement. He did note in the area of the right hand, there were some changes in contrasting areas. The movement was slight, but as shown in the control video, it supported the movement was in an upward position.

CID had an outside agency, Imaging Forensics of Fountain Valley, CA. analyze Sgt. Webber's PDRD video footage. Mr. Reis of that agency has been an expert witness in forensic image analysis, forensic video analysis, and forensic and technical photography through Imaging Forensics. Mr. Reis concluded that due to several factors, resolution, compression, distance from the camera, lighting, and angle of view, discerning if the adult male (Mr. Pawlik) in the PDRD video was in possession of a firearm is not possible. The position of the right hand during the 30 seconds prior to the first shot is not possible for the same reason. However, he stated it is possible to see his overall head movement, some movement of his right arm just prior to the first shot, his overall body position, and some movement of his feet, and possibly his left arm and hand. Given that Mr. Reis is an expert in this field and Sgt. Ramirez is not, Mr. Reis' analysis of the Webber PDRD was considered by the CPRA Investigator as the credible analysis of the two conflicting findings.

The video work accompanying Mr. Reis' work, shows Mr. Pawlik raising and lowering his head four times before he is shot. It is the last time he raises his head that he appears to be making the effort to raise completely. What appears to be his left arm moves twice before the shooting. Mr. Pawlik's right hand movement cannot be discerned, but after Mr. Pawlik is shot, his right arm is thrown backwards as he is falling backwards.

Precision Simulations was hired by Internal Affairs. The videos it produced from the Webber PDRD provide various views in different modes—frame by frame, cropped and enhanced, zoom, no zoom. Likewise, in these videos the movement of the right hand and gun before the officers fired cannot be discerned.

Mr. Pawlik was trying to sit up. It appears to the CPRA investigator in watching the video that Mr. Pawlik may be using his right elbow to help him in trying to sit up.

**b) The ability of the officers to see Mr. Pawlik's right hand and his gun in order to determine if there was an immediate threat.**

Per measurements taken by OPD following the incident, the involved officers were approximately 37 to 41 feet away from Mr. Pawlik at the BearCat. Officer Hraiz on his PDRD can be heard acknowledging the gun was in Mr. Pawlik's right hand before the shooting, meaning he had the belief that what he was looking at was the gun (Hraiz PDRD starting at :14). Officer Hraiz was positioned in the BearCat turret, and said in his interview that he had a better view from up there.

Officer Berger said multiple times prior to the shooting, that he could see Mr. Pawlik breathing, showing some ability to see detail. He was likely the first person that saw movement right as Mr. Pawlik was waking. Officer Berger is also heard on Sgt. Rowley's PDRD telling Sgt. Rowley where the gun is. Officer Berger says, "it looks like a revolver, in the right, just to the—see his knee here. Right there." However, Officer Berger is also heard on his PDRD asking, "Is that it (referring to the gun) down to our right?" Officer Berger then asks, does he have his hand on it? (Berger PDRD/6:34). Officer Berger says, "I've seen him swallow a few times. It's hard for me to tell from here, but--." At 20:25 on his PDRD, Officer Berger asks Officer Julie Yu, did you look through the binos Julie? Officer Berger asks her, were you able to see, is that his hand on the bottom of the gun? Officer Yu told him yes, and then something about the thumb's up. A short time later Officer Berger says though, "Oh the gun just moved. The gun just moved." In his Internal Affairs interview, Officer Berger said he looked through binoculars he had and "confirmed there was a firearm." However, this was not something Officer Berger mentioned in his first interview, nor is his looking through binoculars seen or verbalized on his PDRD.

Sgt. Rowley looked through the binoculars, and was discussing the gun. On his PDRD at around 3:25, Sgt. Rowley says that gun is pointed kind of in our direction. Who sounds like Officer Berger asks, is that down to our right? Sgt. Rowley says it's to our right. Sgt. Rowley says, so if it was to actually fire from this position it would hit the blue house behind you. Officer Berger asks, does he have his hand on it? Sgt. Rowley says his, uh, something is on it. Because whatever is on it is very, kind of square. It could be his hand. Officer Berger says I've seen him swallow a few times it looks like, it's kind of hard to tell from here. Sgt. Rowley says all right, I can't--he has not moved since I've been watching him. Officer Berger asks, any rise and fall of the chest? Sgt. Rowley says nothing at all. Officer Berger says that's what concerns me. Sgt. Rowley says let me look from this side a little bit more.

Sgt. Rowley moves over where Sgt. Negrete is. Sgt. Negrete asks, is it a revolver or a semi-automatic? Sgt. Rowley says it's a semi-auto. Sgt. Rowley says it's a two-tone semi auto. It looks like it's got a tannish lower and a chrome upper. Sgt. Negrete asks, is he--. Sgt. Rowley says he's not moving. I don't see his chest rising or anything like that, but it's kind of hard to tell. And, uh, yeah, it looks like his hand is right on the handle. And the revolver is pointed—Sgt. Negrete interjects that way—towards that blue house.

Unfortunately, there were important details to be elicited at the time of the initial interviews of the officers immediately following the incident, yet these topics were not thoroughly explored through questioning to the satisfaction of the CPRA Investigator. The officers should have been asked to describe in complete detail what they saw, how

Mr. Pawlik was holding the gun before and at the time of the shooting, the angle of his right arm at all times, the placement of Mr. Pawlik's right hand, the placement of his fingers, how many fingers they saw, if the placement of the gun changed from when Mr. Pawlik was sleeping with it to when he allegedly lifted it up, exactly how far he lifted it up, the angles of the gun as it moved in more detail, any problems seeing the gun, the movement of the gun as he was shot, and the location of the gun after the shooting. Discrepancies should have been questioned at the time. Any such information elicited now, over a year after the incident, would not be considered sufficiently reliable, and therefore the subject officers were not re-interviewed by the CPRA.

**c) The position of the gun and Mr. Pawlik's right hand pre-shooting in order to determine if there was an immediate threat.**

A detailed description of the gun in Mr. Pawlik's hand from officers who didn't use force prior to the time Mr. Pawlik fully sat up and the officers fired, was provided by Officer Julie Yu. She observed Mr. Pawlik with and without binoculars.

Officer Yu told IA in her interview that she could see the muzzle of the gun pointed to the ground, but in a southbound direction in the officers' direction. Mr. Pawlik had the gun, but as if he was limp-wristed. Officer Yu felt Mr. Pawlik could easily raise the weapon and have shot it. Having it in that direction, he could have easily anchored the muzzle in the ground to get a better grip the same as raising the gun six inches in the air to get a better grip. Officer Yu felt Mr. Pawlik could easily just drop the gun, but he never released the gun. It was still pointed to the ground anywhere from ninety to forty-five degrees to the ground. She clarified that, by saying when Mr. Pawlik was holding the gun just after waking up from the BearCat's PA (Public Address system), he was sitting up but in a crunch, sit-up position. She said even in that weird angle the muzzle was still pointed in a southbound direction, and if Pawlik pulled the trigger, it would have ricocheted in the direction of the officers.

Officer Yu said that when Mr. Pawlik sat up the first time, the gun was still in his right hand. The gun was not pointed towards her. It was canted in an angle, more towards the ground. It didn't look like initially when Mr. Pawlik sat up he was gripping the entire handle of the gun. He had the gun sitting on his hand, with his thumb securing it in his palm. But he wasn't angling it. Asked if it looked like he had control over the firearm, Officer Yu says yes. He definitely still had it in his hand, she said, because it didn't fall to the ground. He lifted the pistol, which caused it to cant downwards.

Officer Yu said that when Mr. Pawlik woke up, Mr. Pawlik appeared to be "half-heartedly hold the gun," or "half holding" it. Mr. Pawlik appeared to have been startled awake from a deep sleep, but "definitely" still had the gun in his hand. When he sat up, he was automatically facing us she said.

Pre-shooting, Officer Tanaka described the gun being in a low-ready. Sgt. Negrete said the gun was lying in Mr. Pawlik's hand, but then he grasped and raised it. Officer Hraiz said the gun was initially in almost a "laying position" in Mr. Pawlik's hand on the

ground. Officer Berger said that when he first got on scene, the gun was down on the ground in Mr. Pawlik's hand, laying down.

Again, more detail should have been elicited though in the interviews immediately following the shooting, as to how exactly the gun was being held and in what manner, and if that position ever changed, from all officers who observed the gun pre-shooting.

**d) The testimony of the officers who used force regarding the direction and angle of the gun and positions of Mr. Pawlik's arm and hand at the time officers used lethal force.**

Since there is no conclusive video evidence, and only the officers who used force witnessed Mr. Pawlik's actions with the gun at the time he was shot, the information we have of the position of the gun and the barrel of the gun in Mr. Pawlik's right hand comes solely from the statements of the officers who used force.

There were multiple other officers who were on scene during the incident, Officers Palomo, Hawkins, Julie Yu and Sgt. Webber, but they didn't see Mr. Pawlik's actions at the time the subject officers fired their lethal and non-lethal weapons. Officer Palomo is heard on PDRD saying he saw the whole thing at the time of the incident, but in his follow-up interview with Sgt. Vass, he said he could only see Mr. Pawlik awake and looking around but he could not see if he raised his hands or arms. Officer Julie Yu said she moved to utilize the PA system on a patrol vehicle, and was looking in the interior of the patrol car when the officers fired. Officer Hawkins said he was on the side of the BearCat and couldn't see. Sgt. Webber was in the BearCat trying to use the PA system.

The officers who fired lethal/less-lethal at Mr. Pawlik tell generally similar accountings when they were interviewed immediately following the shooting, though there is variation in how far the gun was off the ground. Important details were not properly elicited by the questioners and the details are not clearly established as to heights, the gun movement, Mr. Pawlik's right arm and hand movements, and the angle of the gun. This was critical information to focus on in questioning at the time of the initial interviews of the officers immediately following the incident, yet as described above, these topics were not thoroughly explored right after the shooting when obtaining such information was critical.

Officer Berger said he saw a minute or two after the BearCat arrived, that Mr. Pawlik began to sit up a bit and look around with an irritated look on his face. He slumped back down, and then sat up further. His hand hadn't moved from the ground, but his hand was still on the gun. As he was sitting up further, the gun came up, and the barrel was pointed straight at the officers.

Officer Hraiz said that while he was in the turret (the highest point of all the officers) Mr. Pawlik began to wake up. His hand was still grasping the gun, as he started to move forward. Officers gave commands, and Mr. Pawlik continued to sit up more and as he continued to sit up, the firearm came from a laying position on the ground as if he was going to point the barrel towards officers. He said that the weapon was a few

inches off the ground before he fired. He also said it was coming up, as if he were going to aim or point the barrel towards us. Once it was to the point, he said, I could almost see down the barrel, and it was up.

Officer Phillips stated Sgt. Negrete was giving announcements, and he saw the gun move a little bit. Mr. Pawlik lifted his head a little bit and looked around. Mr. Pawlik was not complying with the announcements. Mr. Pawlik put his head back down, and then his legs moved a little bit, and then his right hand appeared to be moving up a little bit, and his head was starting to come up, and that is when Officer Phillips fired. Officer Phillips said he saw the gun lift towards him and the other officers, and that is when he used his less-lethal force. In his IA interview, Officer Phillips said that Mr. Pawlik appeared to be waking up, and then he lifted his head again. This time, Mr. Pawlik's right hand holding the firearm also raised causing the firearm in his hand to point in their direction.

Officer Tanaka said that he could see Mr. Pawlik with his arm out with his hand looking limp with the gun in it, in low ready on the ground. Mr. Pawlik did a half-sit up, looked around for a few seconds, then went back down. Mr. Pawlik sat up again, scanned side to side, then raised his right arm with the pistol towards the officers about one to two feet off the ground.

Sgt. Negrete said that he recalled Mr. Pawlik sitting up and looking directly at them. He began to give commands. Sgt. Negrete said the gun was already pointed "this way." Mr. Pawlik looked to his right, and then back towards the officers. He said he could see the gun in Mr. Pawlik's open hand, and that Mr. Pawlik grasped it and raised it. Sgt. Negrete says Mr. Pawlik "starts" to bring it up when they used lethal force. In his Internal Affairs interview months after the incident, he said Mr. Pawlik raised his entire arm.

#### **e) The position of the gun post-shooting.**

Mr. Pawlik's head and shoulders appeared to be on a red walkway before he was shot. It appears the rest of his body was on the grass. It is not clear as to where his right arm, hand and the gun were, though it appears that the gun was likely on the grass or on the border of the grass and the walkway due to positioning. Mr. Pawlik's body was awkwardly twisted.

After Mr. Pawlik tried to sit up and was shot, he fell backwards. His head, and right arm and right hand palm side up were on the red walkway behind him (as seen in the Negrete PDRD/39:24). Officer Negrete is heard on his PDRD saying before the officers approach, "the gun is away from him, OK" (Negrete PDRD/38:58). Sgt. Webber stated that he kicked the gun out of the way, and that it was inches away from Pawlik, and not in his grasp. The gun can be heard on Sgt. Webber's PDRD sliding on the red walkway as it is kicked away. Officer Berger said in his interview following the incident, that the gun was in the area by the chimney after Mr. Pawlik was shot, before it was kicked away.

Where Mr. Pawlik's right hand was exactly at the time the officers approached and the location to the gun before it was kicked away were not clearly established by the initial questioners following the shooting and it cannot be seen on PDRD. The gun is not reported as having any damage from rifle shots. In a later interview conducted by the CPRA Investigator, Sgt. Webber said he couldn't remember whether the gun was seen before he kicked it away on the grass or the walkway or portions of both, but he remembered hearing the gun slide on the walkway after he kicked it. He estimated the gun was a foot from the tips of his fingers of his right hand.

If the gun was in a different location post-shooting from where it was originally held pre-shooting by Mr. Pawlik, as appears to be the case, this would also likely indicate that Mr. Pawlik had it in his hand at the time he was shot, as when he was shot, his right arm went behind his head, and there is nothing on video seen showing that Mr. Pawlik's body pushed the gun behind him as he fell backwards in any other manner.

**f) Whether Mr. Pawlik's mental state was a part of the determination of reasonableness of the use of force.**

The mental state of a subject on whom force is used, is a factor in the determination of reasonableness if the person is not a threat to anyone but himself or if he is not posing an immediate threat to anyone.

Officer Palomo stated in his interview with Sgt. Zhou and Ofc. Borocio that Mr. Pawlik looked like he was intoxicated or under the influence, and did not look lucid, saying the subject would lift his head and then put it back down, and then lift it again a second or two later. Officer Phillips said that when he was behind the BearCat he observed Mr. Pawlik lift his head off the ground and appeared to be trying to figure out what was going on. Officer Julie Yu said that Mr. Pawlik had a dazed look on his face when he first woke up. She said his eyes were open just a little as slits. He looked drowsy, as if he was waking up from who knows what. She said, Mr. Pawlik sat up, like a crunch sit-up, and was looking around and as if his eyes were adjusting to the sunlight.

In contrast, all the subject officers who fired lethal rounds said that Mr. Pawlik looked at them intently. Officer Berger said Mr. Pawlik looked at them, and looked irritated. Officer Hraiz said Mr. Pawlik looked angry and agitated, and that he appeared like he knew what was going on around him. Officer Hraiz stated Mr. Pawlik looked upset and that he appeared like he knew what was going on around him "as he glanced back and forth between the officers." Officer Tanaka said that when Mr. Pawlik began to move, he did a half sit-up, looked around for a few seconds, and then went back down. Mr. Pawlik then sat up again, and scanned side to side before raising his right arm. Sgt. Negrete said Mr. Pawlik looked to his right then back towards the officers before "purposefully" grasping the gun.

The ability to tell when someone is or could be drunk, drugged, or mentally confused, is important when formulating tactics.



However, whether intently staring at the officers or looking at them in confusion, if Mr. Pawlik raised his gun at them, he was still an immediate danger and the act of raising a gun directly at an officer when told to drop it can be construed as intent. A not fully lucid, drugged or confused person, can fire a gun in his hand.

**g) Whether Mr. Pawlik could have physically harmed officers or the public.**

The officers were behind a BearCat, which is an armored vehicle through which bullets cannot pass. However, the officers were somewhat exposed—their heads still had to look out at Mr. Pawlik, and in some cases, other parts of their upper bodies were exposed.

The house in the direct line of fire to the gun was evacuated, but there were still some neighbors in their homes.

Mr. Pawlik woke with the gun and would not drop it when commanded to do so, and then started to sit up. Mr. Pawlik still could have fired the gun at any moment.

The facts show the officers' fear of Mr. Pawlik existed before he woke up—officers took shelter behind vehicles and the BearCat because they knew that he had a gun and could wake at any moment and fire without warning. No one could approach Mr. Pawlik to remove the gun when he was asleep or unconscious, because they knew he could wake up and fire at any moment without warning. Officer Yu, who said the barrel of the gun was down when she last saw him prior to the time of Mr. Pawlik was shot, stated that she was fearful Mr. Pawlik could fire, and a bullet could ricochet and hurt someone.

**h) Other possible factors in determining whether an immediate threat existed.**

All of the five officers who fired lethal/non-lethal rounds at Mr. Pawlik appear to have fired close to the same time, which may indicate a mutual perception of danger of some kind. The timing of the firing is very quick--slightly over two seconds. Per DGO K-3, force must cease when there is no longer a threat. It does not appear that firing continued after Mr. Pawlik fell back on the ground with the gun out of his hand.

The firing of the officers' lethal and non-lethal weapons did not occur when Mr. Pawlik first started to sit up. Mr. Pawlik raised and lowered slightly three times prior to the fourth time when he appeared to try to rise in earnest. Thus, the officers were not firing based on body movement alone. It was only when Mr. Pawlik was making a full effort to get up that the officers fired. The firing also commenced as Sgt. Negrete was mid-sentence in giving commands to Mr. Pawlik. Sgt. Negrete in fact sped up his command to drop the gun as Mr. Pawlik was rising, indicating urgency. Sgt. Negrete's command was only half given at the time Sgt. Negrete fired. Afterwards, who sounded like Sgt. Negrete can be heard saying, "god damn it dude, why did—(Negrete PDRD/35:24). Officer Tanaka at 3:02 is heard saying, "why did he have to do that?"

**i) Facts determined to be more likely true than not.**

Looking at the facts of the case, the following facts were determined to be more likely true than not, the standard of proof for this case, as they pertain to all the subject officers who used lethal force:

**1) That it was more likely to be true than not that Mr. Pawlik had a gun in his hand at the time he was shot.**

Even though verifying that the gun was in Mr. Pawlik's hand cannot be independently verified by Sgt. Webber's PDRD, there are many facts that support it is more likely true than not that Mr. Pawlik had his gun in his hand at the time he was shot.

The fact that Mr. Pawlik had a gun in his hand was established from the first sighting of Mr. Pawlik. The gun was first seen by an independent citizen who called 911 and said, "I 'seen' something in the man's hand...it could be a pistol." Officer Phillips, the first police officer to arrive on scene, stood on a nearby porch and confirmed the gun in Mr. Pawlik's hand. From then on, various discussions can be heard on PDRD between officers about the gun in Mr. Pawlik's hand. Some sergeants and officers viewed the gun with binoculars and discussed how it looked and how Mr. Pawlik was holding it. Sgt. Rowley took a photo of the gun, and showed it to others.

There is no evidence from the time Mr. Pawlik was first seen until the time he was shot that Mr. Pawlik ever dropped the gun or had it out of his hand. When Mr. Pawlik woke up, officers kept yelling to drop the gun. As such, it is believed more likely true than not that Mr. Pawlik had the gun in his hand still as he was sitting up, and that he had not dropped it.

After Mr. Pawlik was shot, his right arm was flung in a backwards direction. After the shooting, Mr. Pawlik's right arm can be seen above his head on the walkway. The gun was reported a few inches away from his right hand by Sgt. Webber in his IA interview in August, 2018 and Sgt. Webber was the first officer in line to see Mr. Pawlik following the shooting. Officer Berger said in his interview following the incident, that the gun was in the area by the chimney after Mr. Pawlik was shot, before it was kicked away. The gun can be heard on PDRD sliding off the walkway as it was being kicked away by Sgt. Webber. This would mean the gun was in a different location from where it was originally seen when he was holding it prior to the shooting, having likely been flung backwards from his right hand after he was shot.

**2) That it was more likely to be true than not that Mr. Pawlik raised the gun off the ground at the time he was shot.**

Mr. Pawlik was making some movements in general prior to being shot. His head was raised and lowered somewhat three times before he raised his body the fourth time, appearing to be trying to get up in earnest on the fourth attempt. It appears his left arm moved one or two times before he was shot. It appeared a leg moved a bit before he was shot. Expert George Reis stated that some movement of the right arm is seen

just prior to the first shot. It is nearly impossible for any person to move from a position of lying flat on the ground to sitting up naturally without moving your right arm upwards as well. Therefore, if not intentionally lifting the gun, when Mr. Pawlik woke up and proceeded to fully attempt to sit up, it seems it is more likely to be true than not that at the very least, his upward movement would have raised the gun up. As Mr. Pawlik sat up, if he had a firm grip on the gun the likely result would have been an upwards movement fluid with the upwards raising arm—an experiment that can be recreated by anyone lying in a flat position rising to an upper position with an object in their hand.

**3) That it was more likely true than not that Mr. Pawlik’s gun was facing in the general direction towards the officers when the officers shot Mr. Pawlik.**

There had been discussions heard on PDRD that the gun was facing generally in the direction of the officers prior to the time Mr. Pawlik woke up. No one ever mentioned as heard on PDRD that the direction had changed. Whether the barrel was up, down or straight though at the time of the shooting, we are not able to independently verify. Officer Yu testified the barrel was downwards when she last looked at Mr. Pawlik. But that was also before the subject officers who used force testified that Mr. Pawlik tightened his grip on the gun, and raised it up while attempting to fully sit up.

**4) That it is more likely true than not, that when Mr. Pawlik’s gun raised towards the officers it could be perceived as an objectively reasonable immediate threat under the law, which would allow officers to use deadly force.**

The law in *Graham v. Connor* (1989) 490 U.S. 386, holds that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation. The reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are “objectively” reasonable in light of the facts and circumstances surrounding them, without regard to their underlying intent or motivation.

Here, all the officers who used force stated that the gun was pointed at them and they were fearful for their lives.

The recent Supreme Court case *Kisela v. Hughes* (2018) 138 S.Ct. 1148, is also instructive. This was an excessive force case, in which an officer shot a woman who approached another woman who was standing nearby with a large kitchen knife. The woman with the knife ignored at least two commands to drop the knife. The Court of Appeals for the Ninth Circuit held that the officer who shot Ms. Hughes violated the Fourth Amendment. The Supreme Court decided it did not have to determine whether

or not the officer violated the Fourth Amendment, because “even assuming a Fourth Amendment violation occurred,” the Court decided the officer was entitled to “qualified immunity.” Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights, of which a reasonable person would have known. The focus of the Court was whether the officer had fair notice that his or her conduct was unlawful, judged against the law at the time of the conduct. The court said that existing precedence must have placed the statutory or constitutional questions beyond debate: “In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.” An officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it. Just as the court held in *Kisela* that, “this is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment,” similarly in this case it is not an obvious case that any competent officer would have known that shooting Mr. Pawlik would violate OPD rules and the Fourth Amendment.

The act of Mr. Pawlik sitting up, even with the gun in hand pointed at the officers, can reasonably be interpreted by other people as harmless; that Mr. Pawlik was confused, and was doing nothing more than sitting up, and he was not “aiming” for the officers. However, it can equally be interpreted that Mr. Pawlik was raising the gun to fire. We have no facts to counter that the officers who used lethal force’s perceptions were so implausible, that it is objectively unreasonable. It is the perception of the officers who used lethal force that controls in this matter unless facts can disprove their testimony.

This is the case, even if the officers had perception issues as to where the gun was and how it was moving. *Krueger v. Fuhr* (8<sup>th</sup> Circuit 1993) 991 F.2d 435 held that an erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectively reasonable. Reasonableness must be determined from the point of view of a reasonable officer in the situation rather than with the 20/20 vision of hindsight. Even an officer’s erroneous perception or belief does not alter the legitimacy of the use of force if the perception is objectively reasonable (*Krueger v. Fuhr* (8<sup>th</sup> Cir. 1993) 991 F.2d. 435). Law and OPD rules do not require a police officer risk his or her life if they are in perceived immediate danger.

The Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists (*Elliott v. Leavitt* (4<sup>th</sup> Circuit 1996) 99 F.3d 640). “No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat on his or her life...the Fourth Amendment does not require omniscience. Before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others. Officers need not be absolutely sure, however, or the nature of the threat or the suspect’s intent to cause them harm—the Constitution does not require that certitude precede the act of self protection” (Id.).

The situation Mr. Pawlik presented when initially reported was precarious from the very beginning. Mr. Pawlik had a gun in his hand pointed in the direction of the street where

the officers had to watch him since he was between two houses they did not have access to, in the process of attempting to detain him. The officers prior to firing their weapons recognized this predicament of the placement of the gun in Mr. Pawlik's hand. As heard on Sgt. Negrete's PDRD (one of two/21:01) someone says, "When the dude wakes man, it's going to be a problem. No bueno." Basically, unless Mr. Pawlik released his hold on the gun, any movement of the gun in an upward position by Mr. Pawlik could be interpreted by the officers as a threat.

Once Mr. Pawlik woke up, the threat intensified because Mr. Pawlik was an unpredictable, unknown person with a gun in his hand. Mr. Pawlik was told to drop the gun, and he did not. He started to sit up with the gun. Sitting up, the gun was perceived by the officers who fired as still being in Mr. Pawlik's hand, and still pointed generally in their direction. This continued raising of a gun when given orders to drop it had been made, meant to these officers that Mr. Pawlik intended to harm them. As each of the officers stated in their interviews, at this point they felt that the final four, of the four elements to determine if a person is an "Immediate Threat" as set forth in DGO K-3 were met. One, Mr. Pawlik had the means, as he had a gun, a lethal weapon, in his hand. Two, he had the opportunity as he was generally facing towards the officers who were in front of him, partially exposed, with a gun in his hand and he could have fired at any time. Three, he had the ability, as he was conscious and looking at them with the gun already in his hand. Fourth, his intent could be perceived, because he had been told multiple times by officers to drop the gun, but he did not. Mr. Pawlik continued to sit up with the gun in his hand, and the gun was being lifted upwards in their direction.

The officers who used force had stated the gun was raised from a few inches to up to two feet at the time they shot. Questioning may have helped understand the variations in the officers' testimony; whether it was based on varying perceptions or truthfulness. However, variation can also occur from perceptions based on the quickness of the event, and given the angle of the gun if it was in the process of moving upwards. Mr. Pawlik was in the process of sitting up, and as such the gun and arm would likely be in motion—whether intentionally, or unintentionally. Also, if the gun barrel was somewhat tilted up, there would be variation from the bottom of the gun to the barrel—especially in motion. For example, Officer Berger talked about Mr. Pawlik's hand being at 14 inches when the gun *left* Mr. Pawlik's hand. If the gun was in Mr. Pawlik's hand still as his arm went back, there could be a variation in what was perceived as the height of the gun.

Generally, the subject officers were sequestered prior to their initial interviews, however, it is felt that a sequestering of them in separate locations such as separate patrol vehicles would have been a better practice, rather than moving them off to one side in the general area of each other with Sgt. Jim. While there is no evidence of collusion in testimony, this is also not verifiable.

At least some of the officers would have known or assumed that the incident was being filmed. All of the subject officers had on PDRDs, as did the other officers in the vicinity acting as back-up. Sgt. Webber openly stated on scene that he put his PDRD on the

wide-bar of Officer Phillips' patrol vehicle (Negrete PDRD/22:15) as well as the BearCat, so any officer lying risked being caught on video doing so.

If the officers fired when the gun was actually raised no more than a few inches, the officers made a decision that Mr. Pawlik was a threat with that minimal movement. They did not wait to see if Mr. Pawlik's sitting up was just sitting up with the gun in hand or he was harmless. The decision to shoot here was a split-second decision unfolding quickly once Mr. Pawlik woke up and ignored the officers' warnings. In the few seconds to make a decision as to whether to fire or not, as the officers were faced with here, it would be difficult for the officers to determine if Mr. Pawlik was raising his gun to shoot, or raising his gun as he was merely getting into a better seating position. This was not a risk that officers are required by law or OPD rules to take.

The hardest part in analyzing this case is that decision as to whether Mr. Pawlik's lifting his gun in the general direction of the officers, perhaps minorly—as some have stated, a few inches—while trying to sit up at the time firing commenced was a reasonable threat when judged from the perspective of a reasonable officer on the scene, rather than 20/20 vision of hindsight as *Graham v. Connor* requires. This case has facts that lie close to dividing lines.

The court said that the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers...violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgements—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. As in other Fourth Amendment contexts, however, the reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation...An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional" (*Graham*, supra).

In *Colongue v Hamilton* (1<sup>st</sup> Circuit, 2018) 906 F.3d 150, a recent fatal shooting case also decided on the basis of "qualified immunity," a suicidal man was brandishing a semi-automatic handgun and pointing it at himself and various times at a 45-degree angle over troopers' heads, and ignoring orders to put the gun down for hours. When the suicidal man extended his arm over the officers' heads at about 45 degrees and was told again to put the gun down, after waiting eleven seconds, a tactical police team officer shot and killed him. The court found the officer who fired had qualified immunity. The court found there was little comfort between a gun aimed directly at a person's head and a gun aimed at a forty-five-degree angle over the person's head. The court held that there was no controlling authority or a consensus of persuasive authority sufficient to put an officer on notice that his conduct fell short of the constitutional norm. The court held that the plaintiff in the case had to show that an objectively reasonable officer would have known his conduct violated the law.

In this case, there is no law or OPD rule such that the officers would have been on notice that a man in the process of raising a gun at them, even if minorly, is not an immediate threat or that they fell short of the constitutional norm.

It is recognized that those in charge of this incident, Sgt. Negrete and Incident Commander Lt. Yu, basically set up an extremely limited response scenario for Mr. Pawlik to escape deadly force: wake up, understand what was going on, release the weapon, and through it all, don't move the gun in any significant way that could be interpreted as more of a threat than it already is. The mood of so many officers facing Mr. Pawlik with his gun in hand, waiting to see him move with it, contributed to setting the response that took place. An alternate plan or any restraint was never discussed with the officers on scene who were facing Mr. Pawlik with their rifles despite the precariousness of the situation. Mr. Pawlik sitting up with the gun still in his hand was a very real possibility. Yet what would happen when he did was never discussed. Certainly, the plan choices made here by those in charge for OPD were not the only choices that could have been made.

However, the right to use deadly force when an immediate danger is perceived cannot be confused with other tactics that could have been taken in an attempt to prevent the loss of life here even if some risk by doing so was involved. "A better tactic," "best options," and "likely scenarios" can and should be discussed after the fact, and hopefully used in future scenarios. But they are not the law. In *Plakas v. Drinski* (7<sup>th</sup> Cir. 1994) 19 F.3d 1143, the court stated that there is no law that says the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.

## **VIII. ALLEGATIONS**

### **1. Oakland Police Officer Brandon Hraiz improperly used lethal force when he shot and killed Mr. Joshua Pawlik.**

MOR 370.27 USE OF PHYSICAL FORCE  
FOURTH AMENDMENT

Officer Hraiz stated in his interview after the incident on March 12, 2018 that when he arrived on scene he noticed the subject (Mr. Pawlik) had in his right hand a semi-automatic firearm. He stated, I could tell that it was a chrome slide, and that it was in his hand. When the BearCat arrived, he was instructed to be in the turret. After a couple of minutes in the turret, he stated that the suspect's upper body started coming off the ground and leaning forward. Officer Hraiz stated the subject had a facial expression that was "like, uh, upset or angry." He stated, "it was like disgruntled." Officer Hraiz said he saw Mr. Pawlik's hand still grasping the gun. He said that as Mr. Pawlik got up, as he started moving, "myself and all of the other officers I could hear started giving him multiple commands to don't move, drop the gun, which he was failing to obey." Officer Hraiz said that the individual then continued to sit up more. And as he continued to sit up more, he said he saw the firearm slowly coming from an almost laying position on the ground. Officer Hraiz said the firearm was coming up, as

if Mr. Pawlik was going to aim or point the barrel towards them. Once it was to the point, "I could almost see down the barrel." Officer Hraiz said it was up and he was looking directly at us. Officer Hraiz said, "I knew it was being pointed at myself," and all of the other officers on scene. Officer Hraiz said that just Mr. Pawlik's intent of coming up and pointing that firearm, "I was scared for my life" and everybody else that was on scene. Officer Hraiz said Mr. Pawlik's gun was pointed directly at us. Officer Hraiz said at that point the "safety on my firearm came off and I elected to use deadly force" due to the immediacy of his threat of death.

Officer Hraiz also stated the following, as more detail was elicited: Once he (Mr. Pawlik) initially started to come up, I noticed the gun was still in his hand on the ground laying to the side with the barrel pointing south. As he sat up even more, we were giving him commands don't move your hand, drop the gun which he failed to obey, I then slowly saw his right arm rotate and slightly lift off the ground and the barrel pointed directly towards us. He slowly started to like get up, and then I saw his hand start moving up. And he saw us and he like paused. And he had like an angry face, or he was clenching his jaw or something cause I was close enough to see his facial expressions and then at that point I saw his arm cant and the barrel align straight, and then at which point I used the deadly force.

In his interview with Internal Affairs, Officer Hraiz stated after the BearCat arrived, he took a spot in the turret which he stated gave him a better view of the subject. He also stated that when the subject began to sit up, his grip around the firearm became firmer. Officer Hraiz said that in the turret, his chest and head were exposed to potential gunfire from the subject.

Looking at the four factors found in DGO K-3 which must be established in order for force to be used in relationship to this testimony:

1. Intent: The subject's apparent desire, which can be indicated by words, body language or actions is seen in the statement that the subject was given commands by the police to drop the gun, don't move, which the subject failed to obey.
2. Means: The instrument, mechanical or physical, that may be used to cause injury, is seen in Officer Hraiz' statement that the subject was seen holding a gun.
3. Opportunity: The time and/or place which allows the subject to use the means to cause injury, is seen in Officer Hraiz' statement that the subject was "coming up" and looking at the officers while holding a gun.
4. Ability: The subject has the capability to carry out the action or threat as seen in Officer Hraiz' statement that the barrel of the gun Mr. Pawlik was holding was pointed at him and all the officers on the scene. Officer Hraiz was in the turret, thus largely covered, but with his head and chest were somewhat exposed.

A member may use lethal force to protect themselves or others when the member objectively and reasonably believes that his/her life, or the life of another, is in



immediate danger of death or serious bodily injury, based upon the totality of the facts known to the member at the time.

Officer Hraiz' statements support a finding of a proper use of lethal force. As stated in the general analysis of the four officers who used deadly force, it is more likely to be true than not that the gun actually was raised in the officers' general direction before Mr. Pawlik was shot. If the gun were just a few inches off the ground when Officer Hraiz fired, or even if Officer Hraiz erroneously perceived the gun was being raised, there is no case law absent the barrel of Mr. Pawlik's gun being in a downward angle—which we have no evidence of—that can be found that would prohibit an officer from firing if he perceived Mr. Pawlik was raising the gun up at him, and felt Mr. Pawlik's raising of the gun was a threat.

In the few seconds to make a decision as to whether to fire or not, as Officer Hraiz was faced with here, it would be difficult for Officer Hraiz determine if Mr. Pawlik was raising his gun to shoot, or raising his gun to merely complete getting into a seating position. No law or rule required Officer Hraiz to wait if he reasonably felt threatened.

For the reasons set forth using the analysis section above, section VII, common to all four officers who used deadly force and the statements by Officer Hraiz, by the standard of a preponderance of the evidence, a finding of exonerated is made. Force was used, but it was justified under the Fourth Amendment and OPD rules.

## **FINDING: EXONERATED**

### **2. Oakland Police Officer Craig Tanaka improperly used lethal force when he shot and killed Mr. Joshua Pawlik.**

#### **MOR 370.27 USE OF PHYSICAL FORCE FOURTH AMENDMENT**

Officer Tanaka stated in his interview of March 12, 2018 following the incident that prior to the use of force, he saw the subject's right hand was "extended out towards us" but was limp; but he was holding a pistol in his hand. Officer Tanaka said that pistol was pointed towards us, where officers were. He described the subject's holding of the pistol as similar to "like a low-ready." Officer Tanaka stated I couldn't tell if he was faking being asleep. Officer Tanaka said the officers started providing more commands over the intercom. Officer Tanaka stated I remember multiple times hearing them in English, in Spanish. That's when the subject's body started moving. He did kind of like a half sit-up. Just his upper body moved. Officer Tanaka says Mr. Pawlik looked up kind of for a few seconds, and kind of went back down. And then he did it again, and "like looked at us. He looked irritated. He kind of scanned." Officer Tanaka says I can't remember if it was right to left, or left to right. I remember him distinctly looking at all of us. And then that's when he raised his arm with the silver pistol. He raised it at officers, maybe a foot, two feet, a foot off the ground, directly in our direction. Officer Tanaka says I thought he was going to shoot us. Or me or another officer. And then, I don't know if I was the first one, or if—it kind of felt like everyone analyzed this

deadly threat at similar times. I brought my sights from a low-ready up to a contact ready. I was using my red-dot sight. I put the red-dot sight on center mass on the subject with the gun pointed at us; went to the contact ready and squeezed the trigger, and then it was pretty quick. Officer Tanaka said that he had some cover on the BearCat rail, but parts of his body were exposed.

It is not credible when Officer Tanaka said that after Mr. Pawlik raised his gun up, Officer Tanaka only then brought his sights up to a low-ready, used his red dot sight, and fired. All the firing was over in 2.23 seconds from the time the officers began to shoot until the time shooting ceased. This sounds more like Officer Tanaka is repeating standard information about firing his gun.

It is also concerning that Officer Tanaka's testimony was so different than anyone else in saying the gun was raised a foot to two feet off the ground when he fired. There is a big difference between some of the officers saying the gun was a few inches off the ground when they fired, and Officer Tanaka saying the gun was a foot or two off the ground. There is also a big difference between him saying the gun was raised one foot or two feet.

Additionally, Sgt. Negrete may have tainted Officer Tanaka by after the shooting saying, "dude, you had to. He pointed a gun right at us man." He is also heard on his PDRD at 42:17 saying to Officer Tanaka, "Hey, we had no other option."

Officer Tanaka needed to be asked about his perceptions and actions in his interviews. It could indicate he was being untruthful. However, despite these facts, it still does not mean that Officer Tanaka is being untruthful. If Mr. Pawlik's arm and the gun were in motion upward, he could well have perceived the scene differently in the split seconds he had of the events when the shooting began. Also, while Sgt. Negrete improperly told Officer Tanaka that "he pointed the gun right at us man," it doesn't mean Officer Tanaka didn't already know that.

Looking at the four factors found in DGO K-3 which must be established in order for lethal force to be used in relationship to this testimony:

1. Intent: The subject's apparent desire, which can be indicated by words, body language or actions is seen in the statement by Officer Tanaka that the subject was being given commands by the police, which the subject failed to obey.
2. Means: The instrument, mechanical or physical, that may be used to cause injury, is seen in Officer Tanaka's statement that the subject was seen holding a gun.
3. Opportunity: The time and/or place which allows the subject to use the means to cause injury, is seen in the statement by Officer Tanaka that the susubject was sitting up, and scanning the officers while raising a gun.
4. Ability: The subject has the capability to carry out the action or threat as seen in Officer Tanaka's statement that the barrel of the gun was pointed directly in the

officers' direction on the scene. Officer Tanaka was on the BearCat railing, but parts of his body were still exposed if the subject fired.

Officer Tanaka's statements if believed support a finding of a proper use of lethal force. However, even if his statements are doubted or discounted, as stated in the general analysis of the four officers who used deadly force, it is more likely to be true than not that the gun was raised somewhat before Mr. Pawlik was shot as he was sitting up, and that it was generally pointed in their direction. Even if Officer Tanaka improperly perceived the extent the gun was in movement, he cannot be held to have failed in his duty. There is no law or OPD rule that would prohibit an officer from firing if he perceived Mr. Pawlik was raising the gun up at him, and felt Mr. Pawlik's raising of the gun was a threat.

At the very least, Officer Tanaka's discrepancies could have resulted in a finding of not-sustained. But there was never enough evidence to sustain against him.

For the reasons set forth using the analysis section, section VII above, common to all four officers who used deadly force and these statements by Officer Tanaka, by the standard of a preponderance of the evidence, a finding of exonerated is made. Force was used, but it was justified under the Fourth Amendment and OPD rules.

## **FINDING: EXONERATED**

### **3. Oakland Police Sergeant Francisco Negrete improperly used lethal force when he shot and killed Mr. Joshua Pawlik.**

#### **MOR 370.27 USE OF PHYSICAL FORCE FOURTH AMENDMENT**

Sgt. Negrete stated in his interview of March 12, 2018, taken following the shooting, that when he arrived on scene he saw the subject and said there appeared to be a semi-automatic pistol in his right hand. He stated we had a clear view of everything the subject had; the firearm. Sgt. Negrete stated that after the BearCat was parked, and the engine turned off, the subject woke up. His right arm was out, and his left arm behind him. He was laying on his right side. Sgt. Negrete stated the subject sat up; the gun is still in his hand. Sgt. Negrete stated that the subject sits up and looks at us. His arm extends out. He looks at us a couple times. He kind of looks to the right. Does this weird kind of leaning. Then grabs the gun. The gun is facing us. Then he grasps it in his hand and brings it up. At that point, I was afraid he was going to kill us.

In this Internal Affairs' interview taken later, Sgt. Negrete stated that just before the shooting, he was positioned behind the BearCat, forward of the door, partially exposed. He said that the officers gave the subject clear and loud instructions, which the subject failed to follow. He believed that if he did not shoot the subject that he would have lost his life.

Looking at the four factors found in DGO K-3 which must be established in order for lethal force to be used in relationship to this testimony:

1. Intent: The subject's apparent desire, which can be indicated by words, body language or actions is seen in Sgt. Negrete's statement that the subject was being given clear and loud commands, which the subject failed to obey.
2. Means: The instrument, mechanical or physical, that may be used to cause injury, is seen in Sgt. Negrete's statement that the subject was seen holding a gun.
3. Opportunity: The time and/or place which allows the subject to use the means to cause injury, is seen in Sgt. Negrete's statement that the subject was grasping the gun, and bringing it up.
4. Ability: The subject has the capability to carry out the action or threat as seen in Sgt. Negrete's statement that the gun is facing us. Then the subject grasps it in his hand and brings it up. Sgt. Negrete says, at that point, I was afraid he was going to kill us. In this Internal Affairs' interview, Sgt. Negrete stated that just before the shooting, he was positioned behind the BearCat, forward of the door, partially exposed.

Sgt. Negrete's statements support a finding of a proper use of force. And as stated in the analysis of the five officers who used force, it was found more like to be true than not that the gun actually was raised somewhat before Mr. Pawlik was shot as he was sitting up, and that it was generally pointed in their direction.

For the reasons set forth using the analysis section common to all four officers who used deadly force, section VII above, and these statements by Sgt. Negrete, by the standard of a preponderance of the evidence, a finding of exonerated is made. Force was used, but it was justified under the Fourth Amendment and OPD rules.

#### **FINDING: EXONERATED**

#### **4. Oakland Police Officer William Berger improperly used lethal force when he shot and killed Mr. Joshua Pawlik.**

##### **MOR 370.27 USE OF PHYSICAL FORCE FOURTH AMENDMENT**

Officer Berger stated in his interview the day of the incident, that when he first got there, the gun was down on the ground in Mr. Pawlik's hand, laying down. Prior to the subject sitting up, the only movement he saw was maybe an inch or so. Officer Berger said he told everyone on scene on the radio hey the gun just moved. Officer Berger said he knows the gun came up and was pointed at us. Prior to Mr. Pawlik being struck by rounds, the gun was never out of his hand. After Mr. Pawlik was struck by rounds the subject dropped the gun. Officer Berger says the gun was 14" off the ground when it came out of his hand. Officer Berger says he shot Mr. Pawlik because I felt like that was my only option. Officer Berger said he was pointing a gun at me. I want to

go home every night. When Officer Berger saw Mr. Pawlik point a gun in his direction, he thought that "I was going to die."

Officer Berger stated the look on the subject's face wasn't that he just woke up and was confused. It was like we were bothering him. Officer Berger states as soon as the subject sat up, that's when we began to address him; giving him commands. Officer Berger says, so at that point you could tell he was annoyed that we were dealing with him. During the whole time that he sits up and sees us and then starts falling backwards, we were giving him commands. Someone said try Spanish. Officer Berger said, so we tried giving commands in Spanish. Officer Berger said the subject didn't seem to acknowledge that at all. And then we just continued commands all the way. That's when I saw his right hand with the gun in it come off the ground, and point it at me. Officer Berger doesn't think when the subject first sat up and looked at them, "there is no way that any reasonable person wouldn't know it's the police." Officer Berger says, "It's almost like he was dismissing us by sitting back." Officer Berger also said that once in position by the BearCat, he wasn't completely covered. His upper torso and head were fully exposed.

Looking at the four factors found in DGO K-3 which must be established in order for lethal force to be used in relationship to this testimony:

1. Intent: The subject's apparent desire, which can be indicated by words, body language or actions is seen in Officer Berger's statement that the subject was being given commands which the subject wasn't obeying.
2. Means: The instrument, mechanical or physical, that may be used to cause injury, is seen in Officer Berger's statement that the subject was seen holding a gun.
3. Opportunity: The time and/or place which allows the subject to use the means to cause injury, is seen in Officer Berger's statement that the subject raised the gun, "pointed at us."
4. Ability: The subject has the capability to carry out the action or threat as seen in Officer Berger's statement that the gun was pointed at us. Officer Berger also stated that he was not completely covered by the BearCat, and his upper torso and head was fully exposed.

There is some concern about Officer Berger's ability to see the gun at times, certainly initially. However, its location was pointed out to him. Later, Officer Berger also is heard saying on PDRD he saw it move. Additionally, it is one thing to see an object clearly, and another to see movement. Again, more thorough questioning at the time of the incident would have been of assistance in this analysis.

There is also a concern with Officer Berger, in that prior to the shooting, Officer Berger said to Officer Phillips, "If that gun moves, bag him." Officer Berger said in his Internal Affairs' interview on August 23, 2018 that the statement was made to tell Officer Phillips to "use" the less-lethal beanbag rounds. However, it could also reveal Officer Berger's own frame of mind--that if the gun moved, that he would fire. That would not

be lawful. The gun had to be a threat for his use of force to be proper, and it had to be facing in his direction or in the direction of someone else who could be threatened, not just “moved.”

However, there was no evidence in the investigation to refute that the gun in Mr. Pawlik’s hand was already pointed in the direction of the officers prior to Mr. Pawlik being awake, and that after he woke, Mr. Pawlik likely moved the gun upwards—either intentionally as Officer Berger stated, or when Mr. Pawlik was rising thereby creating the perception to Officer Berger of a lethal risk.

At the very least, Officer Berger’s statement could have resulted in a finding of not-sustained. But there was never enough evidence to sustain against him for his statement. Officer Berger’s statement can be interpreted different ways.

The fact that it was found Mr. Pawlik most likely did raise the gun somewhat when sitting up, and that the officers considered the movement of the gun upwards to be a threat.

Therefore, for the reasons set forth using the analysis section common to all four officers who used deadly force, section VII above, and the statements of Officer Berger by the standard of a preponderance of the evidence a finding of exonerated is made. Force was used, but it was justified under the Fourth Amendment and OPD rules.

## **FINDING: EXONERATED**

### **5. Oakland Police Officer Josef Phillips improperly used force when he used less-lethal force on Mr. Joshua Pawlik.**

#### **MOR 370.27 USE OF PHYSICAL FORCE FOURTH AMENDMENT**

Per Departmental General Order K-3, officers are allowed to use a reasonable amount of force based on a totality of the circumstances.

In his interview of March 12, 2018, Officer Phillips stated he was the first on the scene, and saw the subject with the gun. While announcements were being given to the subject by Sgt. Negrete, he said he saw the gun move a little bit. He said he saw Mr. Pawlik lift his head a little bit, and look around. Officer Phillips said that he saw the subject’s gun lift towards him and the other officers, and at that point, he fired his less-lethal beanbag round towards Mr. Pawlik’s right shin one time.

In his Internal Affairs Interview, Officer Phillips said that Mr. Pawlik appeared to be waking up, and when Mr. Pawlik lifted his head again, his right hand holding the firearm also raised. He stated that Pawlik’s forearm and wrist were raised, causing the firearm in his hand to point in their direction. At this point, Mr. Pawlik was a lethal threat, and at any given moment Mr. Pawlik could have fired his gun.

If Mr. Pawlik was a lethal threat, Officer Phillips had a right to use lethal or less-lethal force against him when he fired a bean bag round at Mr. Pawlik.

There is a concern here in that prior to the shooting, Officer Berger said to Officer Phillips, "If that gun moves, bag him." Officer Berger said in his Internal Affairs interview on August 23, 2018 that the statement was made to tell Officer Phillips to "use" the less-lethal beanbag rounds. Officer Berger said that the term was slang, and it was common term throughout OPD. While there was testimony that the standard term is "thump," Officer Berger is also heard saying to Sgt. Negrete, "if he is not compliant, can we, let's bean bag him right away." Thus, it most likely Officer Berger meant he wanted Officer Phillips to use a beanbag when he said "If that gun moves, bag him." When Officer Phillips was asked in his Internal Affairs interview if he heard Officer Berger say, "If that gun moves, bag him" prior to the shooting, Officer Phillips said no. This is not credible as Officer Phillips was heard on PDRD acknowledging the statement. The concern with that statement is that Officer Phillips fired because Mr. Pawlik's gun merely moved, and not because of an actual threat. The gun would have to be pointed at someone as Mr. Pawlik was rising with it, for the gun to be a threat.

However, Officer Phillips fired at the same time frame as the other officers. There is nothing in the facts we have that can refute that the gun in Mr. Pawlik's hand was already pointed in the direction of the officers prior to Mr. Pawlik being awake, and was either moved upwards intentionally as the officers state, or likely moved upwards when Mr. Pawlik was rising thereby creating the perception of a lethal threat.

For the reasons set forth, a finding of exonerated is made. Less-lethal force was used by Officer Phillips, but was justified under the Fourth Amendment and OPD rules.

## **FINDING: EXONERATED**

### **6. Oakland Police Sergeant Francisco Negrete failed to properly perform his duties as the DAT Supervisor.**

#### **285.00-2\*—SUPERVISORS RESPONSIBILITIES**

Incident Commander Lt. Alan Yu designated Sgt. Francisco Negrete as the DAT supervisor for this incident. As the supervisor, it was Sgt. Negrete's duty to formulate the plan for detaining Mr. Pawlik in a safe manner if possible; that the plan include possible contingencies if Mr. Pawlik did not follow commands; that he assign officers to carry out the tasks within the plan; that he follow OPD's policies and rules; and that per MOR 285.14, he closely supervise the activities of subordinates, making corrections where necessary.

Sgt. Negrete stated in a post-incident interview that for him the priority was setting up a Designated Arrest Team (DAT). Training Bulletin III-N (Police Contact with Mentally Ill Persons, 29 Sep 06) which discusses DAT plans, states that a DAT has singular roles communicated to the individual members, along with contingency plans. Officers shall avoid forcing a confrontation, but be prepared to respond to an exigent circumstance if

they or others are endangered by the actions of the subject. Informational Bulletin "Force Review Boards, Information Updates, Findings" (21 Aug 17) states that for the Designated Arrest Team, supervisors are reminded when supervising DATs to stay engaged continually throughout the search or arrest situation. Supervisors are reminded that they shall be physically present and continually assessing all needed resources, officer positioning and assignments, and the manner in which officers are going to make an arrest.

Per the most recent training history of Sgt. Negrete, he was trained in Critical Incident Management on October 26, 2017 and April 20, 2017, and Critical Incident Supervision on March 17, 2017, Supervisory Leadership and Squad Expectations on March 13, 2017. Additionally, OPD officers are required to know OPD's rules and regulations. Per MOR 314.39, all members and employees shall perform their assigned duties and responsibilities as required or directed by law, Departmental rule, policy or order by a competent authority. Sgt. Negrete stated in his interview with Internal Affairs on August 16, 2018 that he believed he had enough experience to properly handle this type of incident.

OPD's Subject Matter Expert on command and control, Lt. Christopher Shannon, stated that most command officers at OPD attend basic ICS (Incident Command Staff) courses. Within such a course, there is instruction on topics such as ways to manage critical incident scenes with patrol personnel, and concepts such as forming DATs and setting perimeters to contain dangerous subjects. At a minimum, the DAT will have a team leader, a talker/cuffer, a primary lethal cover, and a less-lethal officer. In a scenario with an armed and unconscious or unresponsive subject, ideally there would be at least one additional officer as a utility to fill in if necessary or if an unexpected job arises. In his Power Point training—"Handling Critical Incidents for Supervisors & Commanders" (Lt. Shannon/10 Apr 16), he also described contingency planning for the DAT as looking at "what if" the suspect surrenders; the suspect attempts to flee; the suspect attempts to drive away; there is an active shooter (diversions/breach).

OPD's Subject Matter Expert on DATs, Sgt. Steve Toribio, has trained OPD officers on the use of DAT teams. He stated that a DAT is a static component of an inner perimeter. There are three general contingencies that every DAT is to have, and that is taking the suspect into custody, preventing escape, and bridging the gap in case of some sort of emergency. The DAT is the "what if" squad; this means that if you were to ask, "what if the subject does this" the DAT will have formulated a plan.

Sgt. Negrete stated in his interview with Internal Affairs on August 16, 2018 that he was the one who formulated the plan for the DAT in this case, as well the supervisor who assigned the individual duties for each member, whom he believed to be mature, experienced and reliable.

Sgt. Negrete's plan, using his words, was to do some announcements, Code 3, siren, announcement, Code 3, siren. If there's no response Sgt. Negrete stated, we're going to thump him with the beanbag. If there's a response, we're going to challenge him. He said, we're going to bring him back to the BearCat, handcuff him, obviously unarmed. Once we thump him, then we're probably going to go to a Taser. We'll have



someone stand up there with a Taser, and come down and Tase him. If that doesn't work, then we'll finally come up with a shield or two. Later, Sgt. Negrete is heard saying that if the subject was not compliant, he is going to "get thumped right away."

The facts of this case show serious issues with this DAT plan and Sgt. Negrete's actions as a supervisor. First, Sgt. Negrete's plan was not clear overall. Secondly, critical contingencies and steps were missing. Third, the plan did not properly take into account the actual facts presented in this situation. Fourth, Sgt. Negrete failed to remain in a supervisory role, and properly supervise those under his command. Fifth, Sgt. Negrete failed to assist in the proper sequestration of officers and not discuss the shooting.

#### **A. Sgt. Negrete did not have a clear and comprehensive plan**

Sgt. Negrete never laid out a clear and comprehensive plan if Mr. Pawlik woke up, and didn't comply with their orders. On his PDRD Sgt. Negrete can be heard saying to Lt. Yu, if he wakes up now, "we'll deal with him" (Negrete PDRD 3:55). But how he would "deal with him" was not formulated and explained to anyone. This was critical to be formulated and discussed fully in advance. This error can be seen in Sgt. Negrete's own words, during his initial interview with Internal Affairs. Sgt. Negrete said, "He was not obeying my commands. At this point, I'm thinking of other options for less-lethal, but it evolved so quickly that that didn't happen." A supervisor cannot wait until a situation occurs to start formulating a plan, if they have time to plan in advance. Mr. Pawlik could have had comprehension issues, he had a gun, and the threat was already imminent. There would not reasonably be time to "deal" with Mr. Pawlik and set up a new plan if he woke up and was confused, uncooperative, or ran. If there were steps or orders that were possible to effectively and safely take Mr. Pawlik into custody, they had to be worked out in advance, and every officer had to be informed of the contingencies so that any misstep by Mr. Pawlik would not trigger a deadly reaction or place others in danger.

Sgt. Negrete said that he would "challenge" the subject and then "accept" his surrender. But how he would challenge Mr. Pawlik so that Mr. Pawlik would surrender other than to "thump" him fairly quickly was not laid out or discussed. Per Sgt. Toribio, officers are taught to look at a situation as a chess game and think several steps ahead. There was no discussion of any "what if's," let alone how any "what if's" would be responded to other than in the basic plan.

The facts show that Sgt. Negrete had time to make a plan with contingencies and place officers in roles to meet those contingencies, yet failed to do so. He was on scene with the subject asleep for approximately one half hour before Mr. Pawlik woke up.

Sgt. Negrete is heard saying to presumably Sgt. Webber, since at the time he had the less-lethal rifle, "once this is all set up, you're going to thump him" (Negrete PDRD 1:16). What "once this is all set up," is not clear. It also is not consistent with Sgt. Negrete's plan for verbal challenges and loud noises first to wake Mr. Pawlik.

Sgt. Negrete had asked presumably Officer Phillips if he had a Taser, and told him he was Taser, but later he assigned Officer Phillips to be less-lethal. No Taser person was

then put in place and given instructions. When and under what circumstances a Taser would or could be utilized were left unplanned and unsaid. Sgt. Negrete said in his interview following the shooting that Sgt. Webber was "Taser." But this is inconsistent with Sgt. Webber being "announcer" on the BearCat PA system, and no plan was heard discussed with Sgt. Webber as to being "Taser."

Sgt. Negrete called out to the officers on scene, hey guys if he goes alert, I'll be talking OK. But later Sgt. Negrete told Sgt. Webber that Sgt. Webber would make announcements. Sgt. Negrete is seen on PDRD patting Sgt. Webber on the shoulder and saying to him, if he wakes up, give announcements. Sgt. Negrete is heard on PDRD going over with Sgt. Webber that Sgt. Webber needs to tell the subject not to move if he wakes up, and then to tell the subject after he understands, to put his hands up. However, once Mr. Pawlik woke, Sgt. Negrete himself jumped in immediately (as do many officers) and started giving commands. Sgt. Negrete never delineated his "talker" role from the "announcements" role.

Sgt. Negrete referred to the handcuffing of the subject by saying "we," or "we'll cuff him." Sgt. Negrete and some of the other officers may have assumed since he designated himself talker, he would also be the talker/handcuffer since that is often a combined role in a DAT arrest. However, his role in this regard wasn't made clear at all times to those he spoke with. Sgt. Negrete also did not tell Lt. Yu that he was in the role as talker/handcuffer. And though Lt. Yu didn't ask for clarification either, Sgt. Negrete had a duty as part of his explaining the plan to tell Lt. Yu the roles of the officers on scene.

Sgt. Negrete said he was expecting "two more rifles." But he likewise never said why he needed "two more rifles," or discussed roles for them. Sgt. Negrete was initially expecting another officer with another armored vehicle. Sgt. Negrete never described how he would use the second armored vehicle.

## **B. Sgt. Negrete's plan was missing critical contingencies and steps**

Sgt. Negrete's plan was missing critical contingencies and steps. Other than a complete surrender, nothing else was in place. Nothing was laid out, for example, if Mr. Pawlik woke up and stood up, ran or if he turned the gun away from the officers, but still had it in his hand.

Sgt. Negrete is heard saying if the subject was not compliant, he is going to get thumped right away. He also discussed with Officer Phillips where to shoot the beanbag rounds. But he never discussed with the officers what to do if Mr. Pawlik had any reaction to getting thumped other than giving up and surrendering.

Per DGO K-3, members shall consider the possibility of any language barriers, noise, other distractions, or disabilities which may impair or frustrate the member's efforts to courteously and clearly communicate with the person.

Sgt. Negrete did not make plans if Mr. Pawlik woke, and it became evident he had a mental illness. Sgt. Negrete stated in his Internal Affairs interview, that Officer Hawkins (on scene as a utility officer) was a CIT (Crisis Intervention Training) officer, but he didn't discuss any options with him because it was unknown if the subject suffered from a mental illness. Sgt. Negrete didn't know if Mr. Pawlik suffered from mental illness, but he could have suspected it to be a factor. Mr. Pawlik looked disheveled and homeless. People with a mental illness are more likely to be homeless. Sgt. Negrete should have made a plan with Officer Hawkins in advance, rather than wait until Mr. Pawlik woke to see if Mr. Pawlik had an issue, given he had time to do so. In serious situations such as this where mental health seems a possibility and a life is at stake, DGO-3 requires at least this consideration.

Sgt. Negrete also did not have a Spanish-speaker come to the scene, in case Mr. Pawlik didn't speak English. Officer Phillips had thought Mr. Pawlik was a male Hispanic, as did several other officers. However, Sgt. Negrete specifically rejected getting a Spanish-speaking officer on the scene. Sgt. Negrete said he "knew enough." Yet when it came time to call out to the subject, it was Officer Berger who used his imperfect Spanish to try to say drop the gun. If Mr. Pawlik had answered in Spanish, minimal Spanish would not have been sufficient. As it turned out, it was not an issue. However, Sgt. Negrete rejected the consideration of a language barrier without a good reason.

### **C. Sgt. Negrete's plan did not take into account the actual facts of the situation before him**

Sgt. Negrete's plan did not take properly into account the factual situation before him. Sgt. Negrete stated in his interview following the incident, that in his opinion there was no need to rush. However, Sgt. Negrete made plans to wake and confront Mr. Pawlik in order to "challenge" him. Sgt. Negrete's plan to wake Mr. Pawlik before he woke on his own was potentially problematic because it increased the risk of startling Mr. Pawlik or awakening him when he was still disoriented, under the influence or confused. Mr. Pawlik had been passed out in between two houses for what officers knew was at least an hour, during the day time. Mr. Pawlik appeared asleep, drunk or drugged. Mr. Pawlik had not woken up to the noise of the original sirens of the first officers on scene. Mr. Pawlik looked "homeless," and had multiple assorted bags around him. As such, Mr. Pawlik should have been identified as someone likely under the influence of something, and possibly with a mental illness. There was also enough distance between Mr. Pawlik and the officers that keeping someone watching what was going on with the binoculars on scene or obtaining better ones would have been helpful. It is much easier to make a mistake when your perception might be off.

Sgt. Negrete knew Mr. Pawlik was alive, because Mr. Pawlik could be seen breathing and swallowing; no blood was seen. However, Sgt. Negrete's plan was to wake Mr. Pawlik, rather than let Mr. Pawlik sleep as long as possible. Mr. Pawlik waking on his own increased the chances that he would not be startled or disoriented, when the announcement and commands would be more effective. Sgt. Negrete rejected the use of a police dog because he thought it might startle Mr. Pawlik, but didn't seem to consider that a beanbag round would also startle Mr. Pawlik and could cause him to

shoot. There was no reason to formulate a plan that would rush this situation. The outcome may have been the same in this case ultimately had he chosen not to wake Mr. Pawlik. However, a plan that considered Mr. Pawlik's likely condition first was called for under these circumstances.

Sgt. Negrete's plan did not address the fact that Mr. Pawlik was in a precarious situation where he could easily be startled, confused, under the influence, or disoriented. As such, Mr. Pawlik had the increased potential to raise the gun off the ground, which would then likely be considered an immediate threat by the officers acting as lethal cover. Sgt. Negrete's plan without such a contingency had the potential to be deadly. The "elephant in the room" was the gun already pointed at officers, but Sgt. Negrete was never heard trying to consider or discussing any contingency that might be considered or formulated to avoid lethal force if his raising of the gun seemed accidental. Given a life was at stake, trying to think options through, such as better use of the BearCat, deserved some thought applicable to the circumstances, and not just the basic, talker/cuffer, lethal cover and non-lethal beanbag plan.

Sgt. Negrete's plan of basically giving Mr. Pawlik one option if he woke on his own was problematic. Sgt. Negrete expected Mr. Pawlik to comprehend orders, drop the gun and surrender. If he moved the gun upwards even if by accident, and even if trying to comply, it could have been considered to be a threat. Sgt. Negrete never talked about with the officers whether any level of raising or moving the gun in advance would be acceptable. It is one thing that the law allows officers legally to respond to a perceived threat. It is another to at least discuss a range of possible ideas for seeking a peaceful solution or using some restraint if it is still safe to do so. DGO K-3 states that the Oakland Police Department values the protection and sanctity of human life, and that the Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force.

Sgt. Negrete failed to maximize available resources. For example, Sgt. Negrete had a BearCat, yet using the BearCat as a way to provide cover while initiating a dialogue with Mr. Pawlik even if he wasn't immediately compliant wasn't a plan that was considered.

#### **D. Sgt. Negrete failed to remain in a supervisor role and properly supervisor those under his command**

Sgt. Negrete failed to remain in a supervisory role. Sgt. Negrete handled tasks already assigned to others. Per Sgt. Toribio, it is best for the team leader to step back and remove themselves from other roles; the team leader would just coordinate the other roles with the DAT. Sgt. Negrete assigned himself the role of talker as discussed above, even though he had assigned the role of "announcer" to Sgt. Webber. Sgt. Negrete assigned two officers as lethal cover, Hraiz and Berger. Yet on his PDRD at minute three, Sgt. Negrete is heard talking to himself about whether he can get a good angle, and he is seen in a reflection pointing his rifle in Mr. Pawlik's direction. On his PDRD at 24:35 Sgt. Negrete can be seen holding his rifle in the direction of Mr. Pawlik; a position he appears to have remained in until he directed the BearCat into place. He then appears to have resumed that role of holding his rifle on Mr. Pawlik after the

BearCat was in place. There was no reason Sgt. Negrete needed to be talker, or lethal cover. There were sufficient officers available to fill needed roles. His taking on of multiple roles diverted his attention away from the officers he was supervising. Given a man's life was at stake, his attention to what was happening, giving orders and guidance to the officers on scene, and responding to unfolding situations and the officers' roles in evolving plans was critically important.

Sgt. Negrete's failure to supervise is also evident in his failure to notice that after he arrived on scene, Officer Tanaka had his rifle pointed at Mr. Pawlik as lethal cover standing right next to him, so that now there were four officers acting as lethal cover on a man they wanted to detain. There is no typical number of designated lethal cover units per subject matter expert Sgt. Toribio. However, Sgt. Negrete had already assigned lethal cover, and presumably already taken into account the environment, the fact that there was one subject, and the other angles. Any extra cover would be unnecessary, and could look bad if lethal force had to be used. Meanwhile, again there was no designated officer with a Taser. Sgt. Negrete never knew Officer Tanaka was lethal until after the shooting because he himself was watching Mr. Pawlik as lethal cover with his own rifle in his hands.

Sgt. Toribio stated that ideally, the team leader provides the briefing to the newly arrived officer. Sgt. Negrete did not tell Officer Tanaka when he got on scene what his role was. He did not radio or have Officer Tanaka radioed to inform him as to his role once he got there. Other officers could fill Officer Tanaka in as well if the team leader couldn't, but Sgt. Negrete never discussed Officer Tanaka's role with other officers even though he knew Officer Tanaka was coming since he was driving the BearCat to the scene. After the fact Sgt. Negrete has said he had a plan as to what he wanted Officer Tanaka's role to be--but a supervisor properly conducting his or duties discusses it in advance with those who need to know.

Sgt. Negrete failed to control the instructions being given to Mr. Pawlik when he woke up. Sgt. Negrete gave commands, as did various officers when Mr. Pawlik woke up, which is consistently advised against in training. Conflicting commands can result in deadly consequences. Officer Hraiz gave commands to Mr. Pawlik, as he stated in his interview, and he said other officers did as well. Officer Berger said he gave a command in Spanish, and he said in his interview he also "had the right" to give commands. Sgt. Webber, who had been designated the announcer, tried to use the PA system but encountered a glitch; Officer Julie Yu then got on a patrol car PA system and said drop the gun. These multiple commands being shouted out demonstrate multiple failures on Sgt. Negrete's part: the failure to maintain control of all the officers giving commands; his prior failure to designate one speaker--himself or Sgt. Webber; his failure to address if a command was going to be given in Spanish; his failure to insure commands were not conflicting (hands up/don't move).

**E. Sgt. Negrete failed to assist in the sequestration of officers post-shooting, and in not discussing the incident following an OIS**

Sgt. Negrete also failed in his duties to assist in the sequestering of officers and in not discussing the incident following an OIS. Rather than assisting in the sequestering of Officer Tanaka, Sgt. Negrete improperly stated after the shooting to Officer Tanaka, "dude, you had to. He pointed a gun right at us man." He is also heard on his PDRD at 42:17 saying to Officer Tanaka, "Hey, we had no other option." All officers are trained to not discuss an incident following an OIS. This is a very serious and troubling breach of protocol. Per Departmental General Order K-4—Reporting and Investigating the Use of Force (16 Oct 14), "Every member or employee who uses or is a witness to a Level 1 use of force shall not discuss the incident with others and limit any discussion of the incident to information required..." Further, per Informational Bulletin "Force Review Boards" (04 May 16), which was in effect at the time of the shooting, "Supervisors are reminded they should make every attempt to keep all involved parties separated."

Therefore, because Sgt. Negrete had been trained as a supervisor, and as a supervisor in critical incidents, yet failed to properly supervise for the reasons stated above, it is found that based on a standard of a preponderance of the evidence, Sgt. Negrete is sustained for failure to properly supervise.

**FINDING: SUSTAINED**

**\*Discussion re Classification of Allegation 6 as a Class II violation as to Sgt. Negrete:**

Per DGO M-3, complainants against Departmental Personnel shall be categorized as Class I or Class II offenses. Once the investigation was completed, the CPRA categorized the supervisory allegation for Sgt. Negrete (Allegation 6) as a Class II violation.

Class I and Class II violations per DGO M-3 are defined as follows: Class I violations against Departmental Personnel or Procedures, are the most serious allegations of misconduct and, if sustained, shall result in disciplinary action up to and including dismissal and may serve as the basis for criminal prosecution. Class II offenses shall include all minor misconduct offenses.

Per DGO M-3, a Class I violation for a supervisor includes under subsection E., m. (pp. 5), the "failure of a supervisor/manager to properly supervise, and/or take corrective action for misconduct that he/she knew about or reasonably should have known about."

Looking at the Discipline Matrix found under Training Bulletin V-T "Discipline Policy Appendix," there are two types of MOR (Manual of Rules) classes for a supervisor, and two for commanding officers. The more serious offenses are those that involve gross dereliction of duty, which would be Class I violations, and the lesser violations that involve minor misconduct, would therefore be the Class II violations.

MOR 175.99 defines "Gross Dereliction of Duty" as the failure to use reasonable care to protect life and/or property and to safeguard the legal rights of individuals. Gross dereliction of duty is characterized by carelessness and a reckless disregard for the consequences of the member or employee's conduct.

Looking at what would be gross derelictions of duty under the Discipline Matrix, there are terminations for conduct such as the following: workplace violence; harassment and discrimination; failure to assist a fellow officer; criminal conduct; intentional search and seizure; planting evidence; failure to obey laws; failure to obey a lawful order; failure to report misconduct; soliciting or accepting gratuities; sexual activity on duty; falsely reporting an illness or injury; consumption of intoxicants; collision with gross negligence; accessing inappropriate websites; illegal uses of force; conduct effecting the security of department business; conduct compromising criminal cases; assisting criminals; belonging to subversive organizations; refusing to testify; interfering with investigations; retaliation; truthfulness; and a refusal to accept or refer a complaint.

There are in these allegations conduct that causes harm to the public service; lack of integrity; conduct that effects the integrity of the department; conduct that is vital to effective law enforcement; conduct that has broken or diminished public trust and confidence; constitutional rights violations; criminal law violations; violence and gross indifference to duty; conduct that is willful and deliberate; or that shows a reckless disregard for consequences. Using this type of conduct as the standard, the CPRA categorized the supervisory allegation for Sgt. Negrete as a Class II violation.

Sgt. Negrete's plan, as discussed in detail in the analysis of Allegation 6, above, was not clear overall. Critical contingencies and steps were missing. The plan failed to consider the facts unique to this situation. Sgt. Negrete for example, failed to envision that Mr. Pawlik might be incoherent, under the influence, or have a mental issue, and might try to get up without dropping the gun and prepare his officers for this—even though he knew before him was a homeless-looking man, who was asleep in the day on someone's lawn. There are many facts demonstrating poor choices and decision making, and flaws in his plan. However, the plan as flawed as it was, cannot be shown to be "willful and deliberate" or made with a "reckless disregard" for consequences. Sgt. Negrete had a plan, and his plan showed many steps that are important considerations in these types of situations such as having lethal and less-lethal force available (beanbags, and initially a Taser); containment of the armed subject; and making sure there was adequate cover. Sgt. Negrete voiced a desire to slow things down, even if he failed to see that his plan if carried out wouldn't have achieved that. He voiced not wanting to use a dog, so that it didn't startled Mr. Pawlik. Sgt. Negrete expressed on scene a desire to resolve the matter peacefully.

The success of other plans that Sgt. Negrete could have put in place are still speculative, and there is no guarantee that they would have succeeded. A different set of plans may indeed have prevented this loss of life, and a supervisor should make such plans and take steps that can help to avoid a loss of life. The plan here was basic, and Sgt. Negrete failed to properly plan necessary contingencies that could have arisen. However, the law does not require a particular plan or that risks be taken. If a person

is a lethal threat, an officer has a right to use lethal force whether or not any plan was in place.

A difficult component in determining whether this should have been a Class I or Class II case as to Sgt. Negrete, was deciding how to deal with the inappropriate remarks Sgt. Negrete made to Officer Tanaka after the shooting. Sgt. Negrete said to Officer Tanaka after the shooting, "dude, you had to. He pointed a gun right at us man." He is also heard on his PDRD at 42:17 saying to Officer Tanaka, "Hey, we had no other option." This is a knowing violation of OPD rules not once, but twice. It could be considered as an attempt to taint the investigative process. Sgt. Negrete said he was trying to comfort Officer Tanaka, and indeed as seen on PDRD, Officer Tanaka was very distraught after the shooting. Sgt. Negrete did not make any statements to any other of the officers who used lethal force, and therefore the sentiment of wanting to comfort Officer Tanaka seems credible. However, there were other ways of handling Officer Tanaka's distress. Ultimately, while Sgt. Negrete's statements were completely unacceptable, and he knew or should have known they were inappropriate, because the intent element is not completely evident that he did it to compromise the criminal case or the IA investigation, it was decided to apply the Class II standard.

## **7. Oakland Police Commander Lt. Alan Yu failed to properly perform his duties as the Incident Commander.**

### **MOR 234.00-2\*--COMMANDING OFFICERS RESPONSIBILITIES**

Lt. Alan Yu was the Incident Commander for this incident. MOR 285.00-2 states that an Incident Commander must notify radio that he or she is on the scene of an incident because this identifies and establishes them as the Incident Commander. The Incident Commander is obligated to formulate a plan during a high-risk incident, as time, resources and exigencies allow. At a certain level, it is important for the Commander to plan for exigencies. The Commander should delegate specific tasks to team leaders. The Commander should use the "trust but verify" approach. For example, the Incident Commander would meet with the leader of the DAT. The Commander would ask if they have specific plans for accepting a surrender, deal with an escape, and handle exigent circumstances. The Commander concentrates on the concept of the operation. The team leader would concentrate on the details. The Commander is obligated to evaluate a plan that has been devised by a sergeant/team leader prior to his arrival at the scene. When a sergeant's plan is deficient, the responsibility falls upon the Commander to understand the situation, so that they understand what they are taking over. If the supervisor or team leader failed to provide sufficient detail, the Commander is obligated to elicit sufficient detail from him or her. If the Incident Commander observes any personnel conducting counter-productive actions depending on the nature and severity, the Commander should take action to correct this when possible. The Commander should be ensuring that the ancillary duties (perimeter, evacuation, etc.) are being done. Commanders should know what resources he/she has on scene, and what resources need to be requested. Critical incident checklists are available to Commanders, to help them remember everything that is needed. The intent of



command on the highest level is to preserve life, apprehend the subject and to preserve the crime scene.

Per the Training History of Lt. Yu, looking at some of his most recent trainings, he received Critical Incident training on April 26, 2017 (#10342 Critical Incident RESP/SUP/MGR-16, 24, 32 HR). On October 25, 2016 it states "EFRB/FBR Commander Responsibilities." On July 14, 2016, he was trained in Critical Incident Management. On February 9, 2016, he had an 8-hour course on Use of Force and Litigation. On March 25, 2015, he had training on Firearms, Force Options. On March 23, 2015, he had training on Less Lethal Drag Stabilizer, and he was recertified in ECW. Thus, Lt. Yu had been trained on how to be a commander, what role he needed to play, the use of force and force options.

Critically, Lt. Yu also was an OIS investigator from 2011 to 2016. He had inside knowledge of various OIS incidents, tactics, policies, and failures. Lt. Yu also was involved he said with the investigation of the Oakland Police Department OIS of the sleeping man in the car "in 2013," which also dealt with an unconscious subject in possession of a gun, and which included if the Commander appropriately supervised and implemented proper tactics (Mr. Demouria Hogg, in an incident which occurred June 6, 2015).

Lt. Yu failed in his obligations though in this case, despite his training, in multiple respects.

**A. Lt. Yu failed to understand the situation and the mission, and formulate a plan pertinent to the high-risk situation**

Lt. Yu did not have a complete understanding of what plans were in place, and as such, he did not participate in an overall strategy, that was unique to the circumstances of this scenario. He left the planning almost entirely up to Sgt. Negrete.

In his interview of August 29, 2018 with Internal Affairs, Lt. Yu said that Sgt. Negrete came out to talk to him, "And based on our conversation, I knew we were on the same page what we wanted to do." Yet he admits, "we kind of talked about it slightly. It wasn't a formal sit down, 'Here is what we're going to do' set-up. But first thing out of his mouth was like, 'We're not going to do anything until the BearCat gets here.'" Lt. Yu also said, "...me and him was very much on the same page, he was doing everything that I would also if I was a sergeant at the time. So, that's why I didn't really need to go elaborate into what his plans were. And he was a veteran officer with tactical SWAT experience. He probably knew more than me...I trusted his judgment." Since Lt. Yu didn't solicit necessary details, and relied instead on trust, Lt. Yu failed to recognize the deficiencies in Sgt. Negrete's plan. It was Lt. Yu's obligation to elicit sufficient detail from him.

Lt. Yu did not elicit sufficient detail of the plan to make sure the plan was complete, that it had the necessary contingencies, and that he had sufficient information to evaluate it. Lt. Yu did not question if officers were assigned to cover the necessary roles. He did not question Sgt. Negrete as to contingency planning. Lt. Yu did not

discuss the potential that Mr. Pawlik could be startled awake by any of Sgt. Negrete's plan. They did not discuss what would happen if Mr. Pawlik awoke, and did not comply with the orders to surrender. They did not discuss the precariousness of the situation at hand, and if there was a way to facilitate dialogue none-the-less if possible if Mr. Pawlik didn't initially comply. They discussed the BearCat coming, but other than that, there was no discussion of how it was to be used in particular. Lt. Yu said he ensured that less-lethal was available, but didn't discuss with Sgt. Negrete how less-lethal could be employed.

In his interview with Internal Affairs, Lt. Yu was asked about other forms of active resistance other than if the guy wakes up and points a gun at the officers, like "the guy gets up and starts walking towards you, holding a gun or he starts running right at you? Anything like that?" Lt. Yu stated, "There are so many contingencies. That's not a detail that I would go through with the officers or even Sgt. Negrete. That's an assumption. That is something that the DAT is going to prepare themselves." Lt. Yu at another point in his IA interview stated he didn't want to "micromanage" that portion of the DAT. However, Lt. Yu failed to recognize that as the scene commander, there is a difference between micromanaging and making sure contingencies and plans are in place. Lt. Yu stated, "there are so many contingencies," but a commanding officer's duties include making sure those have been considered. A commander is required to have a "trust but verify" approach.

**B. Lt. Yu failed to properly determine from Sgt. Negrete if specific plans had been formulated to accept a surrender, deal with an escape and handle exigent circumstances**

Sgt. Negrete discussed his plan with Lt. Yu. The description he gave to Lt. Yu was that once the BearCat gets here, we'll make some announcements. Nothing, thump him, beanbag, nothing. Tase him, right, nothing, then we'll move the shields. I'm pretty confident though if he is going to be responsive, that beanbag is going to get his attention real quick. Lt. Yu says yeah. Lt. Yu says we'll do announcements, uh, holding up this thumb and pausing. Sgt. Negrete says sirens. Lt. Yu then brings up the suggestion of a dog (which Sgt. Negrete rejects).

Lt. Yu was asked in his IA interview, if there was any plan or discussion about if Mr. Pawlik woke and was not compliant; he wakes up, and "You say, 'put the gun down', and he says, 'No I'm not going to put it down'." Lt. Yu responded, "we're not going to talk about all the scenarios of what he's going to do with that gun because at that point that's a lethal situation that the DAT will be responding to. We know the DAT responded to it, and that's up to Sgt. Negrete at the DAT to make the decision based on where the gun is, how far he is." However, this shows that Lt. Yu failed to determine if Sgt. Negrete had a specific plan for surrender, deal with an escape, and handle exigent circumstances as he is required to do as he was required to do. Lt. Yu failed to understand that such planning helps to prevent a lethal situation. Thus, Sgt. Negrete's failures are also all Lt. Yu's, when it comes to the plan having with missing parts and contingencies.

### **C. Lt. Yu failed in his duty to observe personnel conducting counter-productive actions, and take action to correct this**

The Incident Commander should observe the DAT sergeant in charge also, to make sure that the sergeant is acting in accordance with OPD's rules and training, and make corrections as necessary. If he observes any personnel conducting counter-productive actions depending on the nature and severity, the Commander should take action to correct this. Lt. Yu was situated on the street on the other side of the divider. He could have or should have seen what Sgt. Negrete and the officers were doing. Sgt. Negrete was holding his rifle up focused on Mr. Pawlik for at least ten minutes prior to the BearCat arriving. After it was in place, Sgt. Negrete held his rifle up again. Lt. Yu should have seen Sgt. Negrete holding up his rifle towards Mr. Pawlik, as well as Officer Berger, Officer Hraiz, and Officer Phillips, and questioned the role of Sgt. Negrete in it. He also does not appear to have seen Officer Tanaka with a rifle pointed at the subject.

### **D. Lt. Yu failed to ensure that ancillary duties were being done**

There was a lapse in the relating of the plan to the perimeter. Sgt. Ann Pierce, who was at the perimeter, stated in her interview with IA that she wasn't there for any planning, nor was she later informed of what the plan was. Lt. Yu was asked in his Internal Affairs' interview of August 29, 2018 if he thought that Sgt. Pierce and the officers in the rear perimeter had a good idea what the plan was. Lt. Yu said "I don't know," even though it is his job to ensure that ancillary duties, such as the perimeter are done. If Mr. Pawlik got up and ran back behind the walkway though, Sgt. Pierce and the other officers present would not have been aware of any plans. Lt. Yu said, "I would say I wouldn't announce the DAT plans to officers in the rear, but if we ever got at that point to where we are going to use the less-lethal, it'll be announced." Lt. Yu stated that Sgt. Pierce was "new," yet his plan was to wait to announce plans to her.

### **E. Lt. Yu failed to know what resources he had on scene, and what resources needed to be requested**

Lt. Yu relied on Sgt. Negrete's expertise with SWAT. But Sgt. Negrete is also a SWAT member, not a SWAT team leader. Lt. Yu should have had the superior knowledge and experience to recognize that more expertise was needed in this scenario, and helped Sgt. Negrete formulate the best plan possible under the circumstances. Sgt. Negrete is a first-line supervisor, and Lt. Yu is a superior commander to him. Lt. Yu foresaw that this could be an OIS; he called Sgt. Rowley back away from the scene where the officers were observing Mr. Pawlik for this reason. Yet he offered little help to Sgt. Negrete as far as tactics or call for assistance for other available resources within OPD in an effort to reduce the risk of injury or loss of life. Lt. Yu said that "life was the number one goal or concern here," but only the life of the officers seemed to be his concern, not that of Mr. Pawlik as well if possible.

Lt. Yu failed to maximize resources. A commander should know what resources he/she has on scene, and what resources need to be requested. Lt. Yu had the option of deploying or requesting the deployment of the Tactical Operations Team, or to include CIT (Crisis Intervention Training), which the facts show he did not consider (Yu interview with IA). As set forth in DGO K-5, during critical incidents the Tactical Operations Team can be called out as a resource for handling the appropriate critical incidents. It consists of tactical commanders, the entry team, the sniper team, and the hostage negotiation team in high-risk operations. This was a situation with a man with a gun in his hand in a high-risk situation but whom they wanted to detain for likely some type of firearm in public charge. The expertise of the Tactical Operations Team as a resource could have helped with the planning. A deeper level of expertise would have been advisable given the situation presented a person whom they wanted to detain, with a gun in his hand pointed towards officers; the possibility of the subject being drugged or drunk was high; the subject's life and the lives of others were at stake; and the situation was taking place in a heavily residential area. Lt. Yu was asked in his Internal Affairs interview of August 29, 2018 if he requested an HNT (Hostage Negotiation Team). He did not. Asked if this could have been of benefit to him, Lt. Yu said no, because "We can't even get him to wake up." Lt. Yu was asked, "What about later on? Let's say hypothetically of course he wakes up and then you're trying to have a dialogue with him. Would that have provided any help?" Lt. Yu's response was "Yeah, that would change the incident. It would change the factors. If we're able to communicate, HNT would be very useful." Thus, Lt. Yu himself after the fact acknowledged that HNT being on scene in advance in case Mr. Pawlik woke would be very useful, if the opportunity arose to talk to him, but failed to add it to the plan.

Similarly, Lt. Yu said in his Internal Affairs Interview that he knew a lot of his officers were CIT trained, but "I can't say which ones exactly." Again, his reasoning was "You can't get CIT anything without communication." He was asked hypothetically about having CIT officers there to consult with Mr. Pawlik if communication could be established. Lt. Yu admitted that "Similar to HNT, it would be helpful if you could establish communication." Lt. Yu failed to understand that establishing communication if possible in high-risk situations is not only "helpful," but critical when possible.

Lt. Yu said that he had not received formal or informal training as to the capabilities of the BearCat. Yet he stated, the "biggest thing is the cover and the tools that are inside." Nonetheless, despite this, there was no discussion of what the "tools" were with Sgt. Negrete, and to get Sgt. Negrete's or other OPD expert's thoughts as to whether any of those tools could have been used. If Sgt. Negrete did not have that expertise, he had the ability to call for assistance from others in the department who might.

Therefore, because Lt. Yu had been properly trained as a Commander in Critical Incident Management, yet failed to properly supervise for the reasons stated above, it is found that based on a standard of a preponderance of the evidence, Lt. Yu should be sustained for failure to properly supervise.

## **FINDING: SUSTAINED**

**\*Discussion re Classification of Allegation 7 as a Class II violation as to Lt. Yu:**

Per DGO M-3, complainants against Departmental Personnel shall be categorized as Class I or Class II offenses. Class I and Class II violations per DGO M-3 are defined as follows: Class I violations against Departmental Personnel or Procedures, are the most serious allegations of misconduct and, if sustained, shall result in disciplinary action up to and including dismissal and may serve as the basis for criminal prosecution. Class II offenses shall include all minor misconduct offenses.

Per DGO M-3, a Class I violation for a supervisor includes under subsection E., m. (pp. 5), the "failure of a supervisor/manager to properly supervise, and/or take corrective action for misconduct that he/she knew about or reasonably should have known about."

Looking at the Discipline Matrix found under Training Bulletin V-T "Discipline Policy Appendix," there are two types of MOR classes for a supervisor, and two for commanding officers. The more serious offenses are those that involve gross dereliction of duty, which would be Class I violations, and the lesser violations that involve minor misconduct, would therefore be the Class II violations.

MOR 175.99 defines "Gross Dereliction of Duty" as the failure to use reasonable care to protect life and/or property and to safeguard the legal rights of individuals. Gross dereliction of duty is characterized by carelessness and a reckless disregard for the consequences of the member or employee's conduct.

Looking at what would be gross derelictions of duty under the Discipline Matrix, there are terminations for conduct such as the following: workplace violence; harassment and discrimination; failure to assist a fellow officer; criminal conduct; intentional search and seizure; planting evidence; failure to obey laws; failure to obey a lawful order; failure to report misconduct; soliciting or accepting gratuities; sexual activity on duty; falsely reporting an illness or injury; consumption of intoxicants; collision with gross negligence; accessing inappropriate websites; illegal uses of force; conduct effecting the security of department business; conduct compromising criminal cases; assisting criminals; belonging to subversive organizations; refusing to testify; interfering with investigations; retaliation; truthfulness; and a refusal to accept or refer a complaint.

There are in these allegations conduct that causes harm to the public service; lack of integrity; conduct that effects the integrity of the department; conduct that is vital to effective law enforcement; conduct that has broken or diminished public trust and confidence; constitutional rights violations; criminal law violations; violence and gross indifference to duty; conduct that is willful and deliberate; or that shows a reckless disregard for consequences. Using this type of conduct as the standard, the CPRA categorized the supervisory allegation for Lt. Yu as a Class II violation.

Lt. Yu failed to elicit sufficient information regarding Sgt. Negrete's plan. He did not question Sgt. Negrete regarding contingency planning, and ensure such planning in all necessary areas was in place. Lt. Yu did not help ensure a plan was in place unique to the circumstances. Lt. Yu did not call in special assistance that could have been utilized

to react to various circumstances that could have transpired. Lt. Yu should have seen Sgt. Negrete holding up his rifle in the direction of Mr. Pawlik multiple times. Lt. Yu relied too heavily on Sgt. Negrete based on their past relationship, trust and presumed level of expertise, rather than the facts before him. There was also a lapse relating to the plan for the perimeter security. Lt. Yu was a passive participant on many levels on scene, and failed to carry out many of the duties and responsibilities required of a Commander. All these are discussed in the analysis of Allegation 7, above.

However, Lt. Yu arrived on scene and had Sgt. Negrete take lead of the DAT since he had DAT experience. Lt. Yu discussed the plan with Sgt. Negrete that he had formulated, and thought it sounded good. He assigned Sgt. Pierce to be perimeter and traffic. He had Sgt. Rowley evacuate homes to the east of the subject.

The plan here was basic and missing contingencies. However, generally the law does not require a particular plan or that risks be taken. If a person is a lethal threat, an officer has a right to use lethal force whether or not any plan was in place. Therefore, for these reasons, Lt. Yu's misconduct was determined by the CPRA to be a Class II violation.

## **8. Oakland Police Officer Brian Tanaka failed to advise Communications of his rifle deployment.**

### **MOR 314.39-2--PERFORMANCE OF DUTY**

The allegation that Officer Brian Tanaka failed to advise Communications of his rifle deployment was an allegation discovered and raised initially by Internal Affairs, arising out of DGO K-6, which states when a PRO (Patrol Rifle Officer) deploys the patrol rifle, the officer shall, as soon as practical, advise the Communications Division. Upon deployment, if applicable and practical, the PRO shall advise the Communications Division of tactical considerations to include: 1) Safest route of approach; 2) Location of the PRO; 3) Location and description of the suspect; and 4) Containment, and crossfire concerns.

The purpose of the policy is so that a supervisor can make tactical decisions and properly allocate resources.

Officer Brian Tanaka did not advise Communications of his rifle deployment and tactical considerations. However, per the statement by subject matter expert Lt. Michael Beaver, the Department's Patrol Rifle Coordinator, there are exceptions. One is that the advisement must be made when it is practical. This is in line with DGO-K-6, which states if applicable and practical. Another exception per Lt. Beaver, is when the officer's sergeant calls him or her to the scene, which is the case here, which may encompass the exception of "applicable."

Officer Tanaka was called by Officer Hraiz, and ordered to bring the BearCat to the scene Code 3, acting on the orders of scene supervisor Sgt. Negrete. There was no talk that Officer Tanaka would be assigned to a particular role in advance. Sgt. Negrete knew Officer Tanaka was coming with a rifle, and in fact stated to someone he had "two more rifles coming," because he had ordered Officer Tanaka and Officer Remo to come with the BearCat and another OPD armored vehicle. That Officer Tanaka was coming with a rifle, the safest route to approach, location of the PROs, location and description of the suspect, containment, and crossfire concerns were all known to and being handled by Sgt. Negrete. Sgt. Negrete should have reported to Lt. Yu that he had "two more rifles coming" and described to Lt. Yu how he intended to use them.

All Officer Tanaka knew, was there was a "dude down with a gun." No other instructions had been given to him. Officer Tanaka brought his rifle to the scene because Patrol Rifle Officers are taught to sling their rifles to allow them to take on other roles, per Lt. Beaver. Officer Tanaka arrived on scene, and normally would have been briefed by the sergeant on scene and assigned a role. In this case, within three seconds of the BearCat engine being turned off, someone yelled "he's moving." There was no time for Officer Tanaka to speak to his supervisor or another officer about his deployment on scene, as he and the other officers around him were all responding to an emergency situation which involved an imminent threat. Sgt. Negrete also had not radioed Officer Tanaka giving him a role in advance.

Therefore, while Officer Tanaka did not call Communications prior to arriving on scene, it is not entirely clear that Officer Tanaka's failure to call into Communications did not meet the exception of "applicable and practical" given the circumstances of this case.

## **FINDING: NOT-SUSTAINED**

## **IX. TRAINING AND POLICY AND PROCEDURES RECOMMENDATIONS AND COMMENDATION**

### **TRAINING RECOMMENDATIONS:**

This case, and other OPD cases in the past, officers have been heard giving conflicting signals at the time officers were calling out to the subject: "don't move;" "put your hands up;" and "drop your weapon." Training is recommended for OPD officers. These statements are not consistent, and could lead to deadly shootings by officers. One officer only should be giving commands, not various as occurred here, and that officer should direct the precise and clearly identifiable steps for a subject one at a time, that the directing officer deems necessary given the circumstances.

The CPRA investigator recommends training for Officer Berger. Officer Berger told Officer Phillips, who had a less-lethal rifle, as heard at 37:58 on his PDRD, if that gun moves, bag him. Someone (presumably Officer Phillips) says yep. Officer Berger is not supervising or giving commands to Officer Phillips. Keep in mind also that Mr. Pawlik at

the time was being told to drop his weapon, which would necessitate hand and gun movement. Movement alone would not justify a use of force.

Officer Berger also stated he had a "right" to give commands in this situation to the subject. In a situation like this where there is a plan in place and a talker is designated, and the talker is already talking, this could result in conflicting orders. While he did not say anything improper here, it is important to make sure that there is only one talker in critical cases such as this.

### **POLICY and PROCEDURES RECOMMENDATIONS:**

The CPRA is not currently a part of the post-OIS officer interview process, or called to the scene. The CPRA director should be notified in the case of an OIS, and CPRA investigators given the option of attendance and participation in the questioning.

Lt. Yu was not interviewed immediately post-incident. Per DGO K-3 however, "Involved personnel" includes a member or employee who uses force or directs the use of force (DGO K-3). Lt. Yu was the Incident Commander and as such approves/directs any use of force, and should have been interviewed immediately post-interview.

CPRA recommends a better practice for sequestering multiple officers. In this case, Sgt. Jim had the officers who fired their weapons off to one side to talk to them. It is recommended that the officers be separated physically as soon as possible, and not be seen together following an OIS at all, such as was the case here.

Lt. Yu stated that he has never had formal or informal training as to the capabilities of the BearCat or how to use it. He has never been inside a BearCat, or received training from the department concerning the placement of a shooter inside the BearCat to shoot out. If OPD officers are in a position to be a commander at the scene of a critical incident in which a BearCat will be used, and it is something that could have tactical advantages, all OPD commanders should be trained and be aware of those capabilities in order to be able to provide critical considerations in evaluating a plan and formulating contingencies.

CPRA recommends that OPD issue PDRDs for commanders. A commander on a critical incident scene should also be required to be wearing a PDRD so that the orders given can be heard.

Lt. Yu should be retrained on the Use of Force Policy, as he confused an "immediate threat" justifying a use of force, with something he erroneously twice called an "immediate imminent threat." (His Crime Report and his Internal Affairs Interview)



**COMMENDATION:**

To Sgt. Webber, for the foresight of placing his PDRD on top of the BearCat.